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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

WILLIAM L. TAYLOR, MARYANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL L. BOURGET AND DAVID A. WEBB,

Petitioners,

v.

STATE OF RHODE ISLAND, DEPARTMENT OF CORRECTIONS AND GEORGE A. VOSE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. SINAPI
AMERICAN CIVIL LIBERTIES UNION
Rhode Island Affiliate
Counsel of Record
V. EDWARD FORMISANO
SINAPI LAW ASSOCIATES, LTD.
100 Midway Place, Suite 1
Cranston, Rhode Island 02920
(401) 944-9690

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the retroactive assessment of offender supervision fees solely and automatically as a consequence of a criminal conviction and the sentence of probation imposed constitutes the imposition of a greater punishment proscribed by the *Ex Post Facto* Clause.

2. Whether the decision of the court of appeals should be vacated and remanded for reconsideration in light of this Court's recent decision in *Lynce* v. *Mathis*, 117 S.Ct. 891 (1997), which rejected the subjective motivation test relied upon by the court below in denying an *ex post facto* challenge to the retroactive imposition of offender supervision fees.

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No. 97-

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PETITION FOR A WRIT OF CERTIORARI

William L. Taylor, Maryanne Silva, Raymond W. Christiansen, Lionel L. Bourget and David A. Webb ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 101 F.3d 780. The opinion of the district court (App., *infra*, 11a-37a) is reported at 908 F. Supp. 92.

JURISDICTION

The court of appeals entered judgement on December 4, 1996 (App., *infra*, 42a) and an amended judgement on December 16, 1996 (App., *infra*, 43a). A petition for rehearing and suggestion of rehearing *en banc* was denied by the court of appeals on January 17, 1997 (App., *infra*, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides, in pertinent part, that "[n]o State shall . . . pass any . . . *ex post facto* Law." This case also involves R.I. Gen. Laws § 42-56-38 and regulations promulgated pursuant thereto, Rhode Island Department of Corrections Regulation No. 10.07.03, which are reprinted in the appendix, *infra*, at 44a-50a.

STATEMENT

The Petitioners are all convicted offenders who committed their respective offenses and were sentenced to probation under the care and custody of the Rhode Island Department of Corrections prior to July 1, 1994. On the basis of a Rhode Island law effective on and after this date, the Respondents subsequently imposed a monthly supervision fee on the Petitioners as an additional condition of their sentences of probation. The Petitioners thereafter filed an action pursuant to 42 U.S.C. § 1983 seeking relief on the ground that, *inter alia*, imposition of the fee violated the *Ex Post Facto* Clause. Jurisdiction of the district court was invoked under 28 U.S.C. § 1331. The district court declared the imposition of the supervision fee on Petitioners to be unconstitutional in violation of the *Ex Post Facto* Clause. On appeal, the court of appeals reversed, based in part on its conclusion that the supervisory fee "comprises no part of the sentence imposed," even though the fee was

assessed solely and automatically as a consequence of a criminal conviction and the sentence of probation imposed. This finding conflicts with this Court's decision in *Weaver* v. *Graham*, 450 U.S. 24 (1981), recently reaffirmed in pertinent part in *Lynce* v. *Mathis*, 117 S.Ct. 891 (1997), which held that an increase in punitive conditions outside the original sentence imposed implicates the *Ex Post Facto Clause*. By erroneously applying the double jeopardy test announced in *United States* v. *Halper*, 490 U.S. 435 (1989), the court of appeals held that imposition of the supervisory fee did not violate the *Ex Post Facto* Clause since there was no subjective intent to punish and the amount of the assessment was not so extreme as to constitute "punishment." The court of appeals' opinion predates this Court's decision in *Lynce*, which rejected the relevance of subjective motivation and reiterated that the focus of an *ex post facto* inquiry is the *effect* on a criminal offender. The case below was also briefed and argued before this Court's decision in *United States* v. *Ursery*, 116 S.Ct. 2135 (1996), which cautioned that the *Halper* test applies only in double jeopardy analysis and even then is narrowly restricted to situations where a fixed monetary penalty is sought in a subsequent civil proceeding.

A. Summary

To the Petitioners' knowledge, this case marks the first time in the history of American jurisprudence where a monetary exaction retroactively imposed as a direct and automatic consequence of a criminal conviction and the sentence imposed has survived an *ex post facto* challenge. By redefining what constitutes "punishment" based on an erroneous double jeopardy analysis and contrary to nearly 200 years of *ex post facto* case law, the decision below is an invitation to states to raise revenues through the retroactive imposition of monetary payments on criminal offenders, which are carefully labeled as "fees for services" in order to exploit the *ex post facto* loophole created by this case. If left undisturbed, it will inevit-

ably precipitate a flood of litigation — which has already started — wherein courts will be forced to adjudicate under what circumstances, to what extent, and in what amounts states may retroactively impose "fees for services" on criminal offenders. The court of appeals decision effectively authorizes states to do by indirection that which they could not do directly — retroactively increase the monetary penalty imposed on sentenced criminal offenders. To restate the issue another way, the question presented is whether, by merely asserting a nonpunitive purpose for monetary exactions which do not exceed the cost of "services" provided, a state may impose fees on criminal offenders which have the *effect* of retroactively inflicting a greater punishment, and thereby escape the constraints of the *Ex Post Facto* Clause.

Although the precise issue before the Court is one of first impression, the court of appeals' decision conflicts with well-settled precedents of this Court, in particular its recent unanimous decision in *Lynce* which was announced subsequent to the decision of the court of appeals. The decision is also contrary to the result reached by the only other court of appeals to rule on this issue, and it conflicts with recent decisions of numerous state and lower federal courts which have uniformly held in similar contexts that the retroactive imposition of a monetary exaction solely and automatically as a consequence of a criminal conviction violates the *Ex Post Facto* Clause. The decision of the court below is clearly erroneous and involves a serious encroachment on the important constitutional right to be free from the retroactive imposition of a greater punishment. Moreover, this case is deserving of heightened scrutiny by this Court insofar as the challenged statute seeks to retroactively impose a greater burden on perhaps the most unpopular and powerless of groups — criminal offenders.

B. Offender Supervision Fee Statutory Scheme

Rhode Island General Laws § 42-56-38, as enacted by P.L. 1992, c. 133, art. 97, § 2 (App., *infra*, 44a), provides, *inter*

alia, that every sentenced criminal offender committed to the care, custody and control of the Rhode Island Department of Corrections ("Department"), including but not limited to those on probation or parole, "shall reimburse the state for the costs or the reasonable portion thereof incurred by the state relating to such commitment." Individuals incarcerated while awaiting trial are exempted from this reimbursement obligation if they are not subsequently convicted. *Id.* The statute specifically provides that it shall not be effective until the date rules and regulations implementing its provisions are filed with the Rhode Island Secretary of State. *Id.* On June 17, 1994, the Respondents filed rules and regulations with the secretary of state implementing § 42-56-38 entitled "Adult Probation and Parole Offender Supervision Fees," effective as of July 1, 1994, providing for the imposition of sentenced offender supervision fees, designated as Regulation No. 10.07.03 ("Regulation") (App., *infra*, 45a-50a). The Regulation provides that a monthly supervision fee of $15.00 shall be assessed on probationers and parolees effective July 1, 1994. *Id.* Although an offender's probation may not be violated *solely* for non-payment of the fees, the Regulation does provide that in the context of a probation revocation hearing "non-payment of offender fees may be brought to the attention of the court, formally or informally, as indicative of a lack of cooperation, failure to fulfill lawful obligations or other pattern of non-compliance." Regulation § 10.07.03 (II)(D)(3), App., *infra*, 48a.

C. Retroactive Implementation

The Petitioners all committed their respective offenses and were convicted, sentenced and placed on probation under the care and custody of the Department prior to July 1, 1994. App., *infra*, 56a. Accordingly, neither at the time the Petitioners' underlying offenses were committed nor at the time the Petitioners were sentenced to probation was an offender supervision fee imposed by law as a condition of such probation or otherwise. *Id.* Nevertheless, on June 16, 1994, Respondent

George A. Vose, Jr., Director of the Department, sent a letter addressed to all individuals who were on probation or parole in Rhode Island, including Petitioners, notifying them that a monthly offender supervision fee would be imposed commencing July 1, 1994. *Id.* at 54a. The imposition of the fee amounts to an additional monetary penalty on the Petitioners which ranges between $135.00 and $3,405.00 through the terms of the Petitioners' respective periods of probation. *Id.* at 51a-52a.

D. District Court Decision

The Petitioners thereafter commenced suit in the district court claiming that the offender fee statute, as applied, violated the *Ex Post Facto* and Due Process Clauses of the United States and Rhode Island Constitutions. The case was decided in the district court on cross-motions for summary judgment on an agreed statement of facts. The district court granted Petitioners' motion for summary judgment on the ground that the challenged provision violated state and federal *ex post facto* prohibitions and also on the ground that retrospective application of the provision to the Petitioners violated statutory authority. 908 F. Supp. at 95-96, 107, App., *infra*, 12a, 37a. The district court rejected Petitioners' substantive due process claim, and granted Respondents' cross-motion for summary judgment thereon. *Id.* The district court did not reach and therefore denied both the Petitioners' and Respondents' requests for relief on the procedural due process claim. *Id.* Finally, the district court granted summary judgment to Respondent George A. Vose, Jr. in his individual capacity on the ground of qualified immunity. *Id.* The net effect of the district court's decision was to declare the application of the challenged provision imposing offender supervision fees to be unconstitutional in violation of the *Ex Post Facto* Clauses of both the state and federal constitutions, but only as to individuals whose offenses were committed prior to the effective date of the statute.[1] The

[1] In its Memorandum and Order dated November 21, 1995, the district court originally declared the challenged provision unconstitutional as to offenders *sen-*

district court found that imposition of the fee solely and automatically as a consequence of a criminal conviction and the sentence of probation imposed inextricably linked the fee to Petitioners' criminal convictions and therefore was part of the "law annexed to the crime." *Id.* at 101, App., *infra*,, 24a-25a. Since imposition of the fee had the effect of "make[ing] more burdensome the punishment for a crime," on the basis of *Weaver* v. *Graham*, 450 U.S. at 24, and well-settled *ex post facto* doctrine, the district court found the fee to be unconstitutional in violation of the *Ex Post Facto* Clause as applied to the Petitioners.

E. Court of Appeals Decision

The court of appeals reversed the district court and remanded the case for further proceedings on the Petitioners' procedural due process claims under state and federal law. Although the court of appeals acknowledged that the offender fee statute, as applied to the Petitioners, was retrospective, the court nevertheless rejected Petitioners' *ex post facto* challenge on the ground that imposition of the fee did not constitute proscribed "punishment." The court of appeals reached this result by applying a subjective test for defining "punishment" coupled with an objective standard derived from this Court's decision in *Halper*, 490 U.S. at 435. 101 F.3d at 782-784, App., *infra*, 6a-10a. Accordingly, the court of appeals determined that "under the current regime governing civil provisions the relevant inquiry was not only whether the legislative *intent* was punitive in nature, but whether the challenged civil provision is 'so extreme as to constitute punishment.'" 101 F.3d at 783 (emphasis in original) (quoting *Halper*, 490 U.S. at 442.), App., *infra*, 7a. In applying the foregoing test, the court of

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tenced to probation prior to its effective date. 908 F. Supp. at 107, App., *infra*, 37a. In response to a motion filed by Petitioners seeking additional findings and to alter or amend the judgment pursuant to Fed. R. Civ. P. 52(b) and 59(e), the district court issued a subsequent order dated January 10, 1996 (App., *infra*, 38a) clarifying that it was the date of the offense, not the date of sentencing which was the relevant date for applying the *ex post facto* prohibition.

appeals found, as a preliminary matter, that the offender fee statute imposed a "civil charge" which "comprises no part of any sentence imposed for the crimes committed by offenders." 101 F.3d at 783, App., *infra*, 7a-8a. In reaching this conclusion, the court of appeals ignored the teaching of *Weaver*, which held that the retrospective imposition of a greater punishment violates the *Ex Post Facto* Clause even if it alters punitive conditions outside the sentence itself. 450 U.S. at 32; *accord*, *Lynce*, 117 S.Ct. at 898. Because the fee was designed to "reimburse" the Department for costs reasonably incurred in providing supervisory services to probationers and parolees, the court of appeals concluded that the statute neither in its *purpose* nor by application of the *Halper* objective test constituted "punishment" proscribed by the *Ex Post Facto* Clause. 101 F.3d at 783-784, App., *infra*, 7a-10a.

REASONS FOR GRANTING THE PETITION

The Petitioners' claim in this case is relatively simple and the material facts are not in dispute. The Respondents imposed offender supervision fees on Petitioner probationers, which average $972.00 each and range as high as $3,405.00 as to one Petitioner, even though the state law authorizing such fees was not in effect at the time the Petitioners' underlying offenses were committed, at the time they were sentenced, or at the time they were placed on probation. As a consequence, in addition to now having to pay punitive fines disguised as "offender supervision fees," Petitioners face possible revocation of their probation due, at least in part, to non-payment of the fees. According to well-settled law and controlling Supreme Court precedent, where, as here, an increased monetary penalty is imposed either at the time of sentencing or automatically as a result of the imposition of a criminal sentence, it is part of the "law annexed to the crime" and constitutes punishment as a matter of law which is proscribed by the *Ex Post Facto* Clause. *See Lynce*, 117 S.Ct. at 891; *Weaver*, 450 U.S. at 24.

The foregoing conclusion urged on this Court is not a novel one, but flows inexorably from the broad application accorded

the Clause under an unbroken line of Supreme Court precedent[2] and is the same result reached by the Fifth Circuit in a recent case in deciding a similar issue, *Sheppard* v. *Louisiana Bd. of Parole*, 873 F.2d 761 (5th Cir. 1989). Moreover, the Petitioners' position is also consistent with recent decisions of numerous state and lower federal courts which, in similar contexts, have unanimously held that the retroactive application of provisions imposing additional costs, civil assessments or restitution violates the *ex post facto* proscription, including a recent decision of the First Circuit.[3]

In the face of the foregoing well-settled law, the court of appeals nevertheless reversed the district court's grant of sum-

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[2] *See Lynce*, 117 S.Ct. at 891 (cancellation of provisional early release credits awarded to alleviate prison overcrowding); *Miller* v. *Florida*, 482 U.S. 423 (1987) (increase in presumptive sentence range under sentencing guidelines); *Weaver*, 450 U.S. at 24 (loss of mandatory gain time credited to reduce prison term due to good conduct); *Lindsey* v. *Washington*, 301 U.S. 397 (1937) (changing maximum sentence from discretionary to mandatory); *In re Medley*, 134 U.S. 160 (1890) (requiring solitary confinement prior to execution); *Burgess* v. *Salmon*, 97 U.S. 381 (1878) (increasing commodities tax and imposing criminal penalties for failure to collect additional duty); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1867) (requiring ministers, priests and lawyers to take loyalty oath failing which they must either cease engaging in their profession or become subject to criminal penalties); *see also Collins* v. *Youngblood*, 497 U.S. 37 (1990); *Beazell* v. *Ohio*, 269 U.S. 167 (1925); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798).

[3] *United States* v. *Gilberg*, 75 F.3d 15 (1st Cir. 1996) and *United States* v. *DeSalvo*, 41 F.3d 505 (9th Cir. 1994) (restitution ordered under amended Victim and Witness Protection Act); *Government of Virgin Islands* v. *D.W.*, 3 F.3d 697 (3rd Cir. 1993) (monetary fine imposed on juvenile); *Sheppard* v. *Louisiana Bd. of Parole*, 873 F.2d 761 (5th Cir. 1989)(parole supervision fees); *Matter of Appeal in Maricopa Cty. Juv. Action*, 139 Ariz. 170, 677 P.2d 943 (Ariz. App. 1984) (imposition of $100.00 assessment and $100.00 in restitution); *People* v. *Stead*, 845 P.2d 1156 (Colo. 1993)(en banc)($1,000.00 payment to drug offender surcharge fund); *Petition of State*, 603 A.2d 814 (Del. 1992) (percentage assessments to be paid to victim compensation and drug rehabilitation funds); *State* v. *Yost*, 507 So. 2d 1099 (Fla. 1987) (monetary penalties for nonpayment of assessed fees and court costs); *People* v. *Rayburn*, 258 Ill. App.3d 331, 630 N.E.2d 533 (1994) ($100.00 fine to be paid to family abuse fund); *People* v. *Slocum*, 213 Mich. App. 239, 539 N.W.2d 572 (1995) (payment of cost of extradition as part of court-ordered restitution); *People* v. *Zinke*, 147 A.D.2d 106, 541 N.Y.S.2d 986 (A.D. 1 Dept. 1989) (5% surcharge on sentence of restitution); *People* v. *Valdelamar*, 122 A.D.2d 289, 505 N.Y.S.2d 192 (A.D. 2 Dept. 1986) (mandatory penalty assessment of $75.00 per indictment); *State* v. *Short*, 177 W.Va. 1, 350 S.E.2d 1 (1986) (payment of restitution beyond period of probation); *Loomer* v. *State*, 768 P.2d 1042 (Wyo. 1989) (costs of prosecution).

mary judgment in favor of Petitioners. The court of appeals' decision in this case has thus effectively overruled and turned on its head nearly 200 years of *ex post facto* decisional law, by redefining the term "punishment" so as not to include a monetary exaction imposed as a direct and automatic consequence of the imposition of a criminal sentence, contrary to authoritative Supreme Court precedent. *See* cases cited *supra* note 2. In reaching this result, the court of appeals ignores the teaching of *Weaver* and this Court's recent decision in *Lynce*, which hold that an increase in punitive conditions outside the sentence itself violates the *Ex Post Facto* Clause. Indeed, the foregoing holding of these cases applies with particular force where, as here, the increase in punishment is not triggered by any conduct, activity or proceeding other than the sentence imposed. The court of appeals decision also misconstrues and/or misapplies precedent delineating the scope of constitutional protection available in the double jeopardy context, which is inapposite to this case according to this Court's recent decision in *Ursery*, 116 S.Ct. at 2135, decided after this case was briefed and argued before the court of appeals.

The court of appeals erroneously applied what it perceived to be the coupling of an objective and subjective "purpose" test espoused in *Halper*, 490 U.S. at 435, outside the narrow, monetary civil penalty/double jeopardy context to which that standard applies according to the holding in *Ursery*. 101 F.3d at 783, App., *infra*, 6a-7a. In doing so, the court of appeals ignored the fact that the supervision fee imposed in this case has the *effect* of retroactively imposing a monetary penalty on the Petitioners as the sole and direct consequence of a criminal conviction, contrary to authoritative Supreme Court precedent, including this Court's recent decision in *Lynce*, and the weight of legal authority. *See* cases cited *supra* notes 2-3. By erroneously, *inter alia*, applying a double jeopardy definition of "punishment," the court of appeals stripped the Petitioners of the fundamental protections guaranteed by the *Ex Post Facto* Clause: fair notice of the penalties applicable to criminal conduct and an injunction forbidding the legislature from arbitrarily

imposing a greater punishment after the fact. *Weaver*, 450 U.S. at 28-30. Indeed, such an after the fact "changing of the rules of the game" which seeks to impose an additional monetary penalty on perhaps the most unpopular and powerless of groups — criminal offenders — for the politically expedient purpose of raising revenues without increasing taxes on the general public, implicates the very type of lack of notice and legislative restraint against which the *Ex Post Facto* Clause is designed to safeguard. *Id.*

Finally, in contrast to the plethora of Supreme Court and state and lower federal court precedents which support Petitioners' contention in this case, the court below relies on three court of appeals decisions that are inapposite both as to the law and facts of this case, and which were otherwise erroneously decided insofar as they improperly apply the *Halper* test to non-monetary, civil penalties contrary to the holding in *Ursery*. 101 F.3d at 783, App., *infra*, 6a-7a. The net effect of the court of appeals' decision is to validate retroactive imposition of monetary exactions in any amount on any probationer or parolee as long as it does not exceed the cost of supervision or services provided, and is therefore considered "remedial." *Id.* at 784 and n.7, App., *infra*, 9a-10a. Aside from the fact that neither the court of appeals nor Respondents have cited a single case supporting this proposition in the *ex post facto* context, as noted by the district court, "this type of conclusory analysis leads to a 'slippery slope,' where a state could, by simply designating funds for a particular cost or by careful labeling, impose almost any new fine without being subject to the constraints of the *Ex Post Facto* Clause." 908 F. Supp. at 102, App., *infra*, 26a. In short, the First Circuit has issued an unprecedented ruling, contrary to the definition of what constitutes an *ex post facto* law, by holding for the first time that a monetary penalty imposed as a direct and automatic consequence of a criminal conviction does not constitute a prohibited, retroactive imposition of a "greater punishment."

Thus, the court of appeals decision conflicts with previous precedents of this Court defining what constitutes proscribed

punishment in the *ex post facto* context, in particular, this Court's recent opinions in *Lynce* and *Weaver*, the result reached by the only other court of appeals to address the issue, and recent decisions of numerous state and lower federal courts which have unanimously held that the retroactive imposition of a monetary penalty solely and automatically as a consequence of a criminal conviction violates the *Ex Post Facto* Clause. Moreover, the decision of the court of appeals is clearly erroneous and is based on a misconstruction and misapplication of case law applicable only in the double jeopardy context. Finally, the court of appeals' decision violates one of the fundamental protections against arbitrary changes in the law embodied in the Constitution — the presumption against the retroactive application of new laws.

I. The Court of Appeals' Decision Conflicts With Controlling Precedents of This Court, the Result Reached By the Only Other Court of Appeals to Address the Issue, and Numerous State and Lower Federal Court Decisions Which Have Uniformly Held That Retroactive Imposition of Monetary Exactions Solely and Automatically As a Consequence of a Criminal Conviction Violates the Ex Post Facto Clause.

The court of appeals' decision is clearly contrary to controlling *ex post facto* precedents of this Court, including *Lynce* and *Weaver*, and also conflicts with the result reached in *Sheppard* v. *Louisiana Bd. of Parole*, 873 F.2d at 761, by the Fifth Circuit, the only other court of appeals to address the issue of the retroactive imposition of supervision fees. The decision is also contrary to recent decisions of numerous state and lower federal courts unanimously upholding *ex post facto* challenges in similar contexts. The fundamental error pervading the decision of the court of appeals is a misconstruction and misunderstanding of what constitutes punishment in the *ex post facto* context according to well-settled law.

A. The Decision Conflicts With Authoritative Precedents Of This Court Defining "Punishment" In The *Ex Post Facto* Context.

The *Ex Post Facto* Clause,[4] *inter alia*, prohibits any retroactive increase in the punishment imposed for criminal acts.[5] Such laws implicate the central concern of the *ex post facto* prohibition: "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver*, 450 U.S. at 30. To fall within the *ex post facto* prohibition, two essential elements must be present: first, the law " 'must be retrospective, that is, it must apply to events which occurred before its enactment;' " and second, " 'it must disadvantage the offender affected by it,' " *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver*, 450 U.S. at 29), by altering the definition of criminal conduct or increasing the punishment for a crime, *Collins* v. *Youngblood*, 497 U.S. 37, 43, 49-50 (1990). *Accord*, *Lynce*, 117 S.Ct at 896. Accordingly, a law violates the *ex post facto* prohibition where it assigns more disadvantageous criminal or penal consequences to an act than the law did when the act occurred. *Weaver* 450 U.S. at 29-30. As the *Calder* Court put it, a law violates the *ex post facto* provision when it "inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in original). To use the *Beazell* formulation, any law " 'which makes more burdensome the punishment for a crime, after its commission . . . is

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[4] Article I of the United States Constitution provides that neither Congress nor any State shall pass any "*ex post facto* Law." U.S. Const. art. I, § 9, cl. 3 and art. I, § 10, cl. 1.

[5] *Lynce*, 117 S.Ct. at 895; *Collins* v. *Youngblood*, 497 U.S. at 43-44; *Weaver*, 450 U.S. at 28 (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) at 325-326; *see also Lindsey* v. *Washington*, 301 U.S. at 401 ("The Constitution *forbids* the application of *any new punitive measure* to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.")(emphasis added); *Calder* v. *Bull*, 3 U.S. (3 Dall.) at 397 (Patterson, J.) ("The enhancement of a crime or penalty, seems to come within the same mischief as the creation of a crime or a penalty" after the fact.).

prohibited as *ex post facto*.' " *Collins*, 497 U.S. at 42 (quoting *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925)).

Insofar as the challenged statute was not in effect at the time the Petitioners' underlying crimes were committed, it is clear that imposition of the fee was retrospective as to the Petitioners. Nevertheless, the court of appeals found that the *Ex Post Facto* Clause was not violated based on its conclusion that the fee was not punitive. 101 F.3d at 783-784, App., *infra*, 8a-10a. Thus, the narrow issue before this Court is whether the imposition of supervision fees on Petitioners constitutes a "greater punishment" proscribed by the *Ex Post Facto* Clause as that term has historically been defined by controlling precedents of this Court.

In the case at bar, the challenged provision imposes monthly offender supervision fees on Petitioners solely as a result of their having been sentenced to a term of probation for the commission of one or more criminal offenses. There is no conduct, activity, or proceeding which triggered the Petitioners' obligation to pay the fee other than the sentence of probation previously imposed on each of them. Neither at the time the Petitioners underlying offenses were committed nor at the time they were sentenced to probation was an offender supervision fee imposed by law as a condition of such probation or otherwise.

It is beyond peradventure that the payment of this additional fee as a consequence of having been sentenced to a term of probation following the commission of a crime changes the "quantum of punishment" and is disadvantageous to the Petitioners. *Weaver*, 450 U.S. at 33; *see also Collins*, 497 U.S. at 41-43 (*ex post facto* prohibition applies to *any increase in penalty* by which crime is punishable). As noted by the district court below, under both state and federal law, probation is clearly considered to be punishment. 908 F. Supp. at 100, App., *infra*, 22a. Moreover, where, as here, an additional penalty is inflicted automatically upon imposition of a criminal sentence, it is part of the "law annexed to the crime," *Calder*, 3 U.S. (3 Dall.) at 390, and thereby implicates the *Ex Post*

Facto Clause. 908 F. Supp. at 101 (citing *Petition of State*, 603 A.2d 814, 817-18 (Del. 1992)), App., *infra*, 24a-25a. By any reasonable construction, imposition of the fee by operation of the challenged provision has "ma[de] more burdensome the punishment" of Petitioners' probation. *Beazell*, 269 U.S. at 169. Such an additional penalty imposed automatically as a result of a criminal conviction constitutes "punishment" as a matter of law forbidden by the *Ex Post Facto* Clause in accordance with well-settled precedents of this Court.[6] *See* cases cited *supra* note 2.

Moreover, Petitioners in the case at bar face far more than merely the imposition of an additional fine. Although the Petitioners' probation may not be violated solely for non-payment of offender supervision fees, the Regulation does provide that in the context of a probation revocation hearing "non-payment of offender fees may be brought to the attention of the court, formally or informally, as indicative of a lack of cooperation, failure to fulfill lawful obligations or other pattern of non-compliance." Regulation § 10.07.03(II)(D)(3), App., *infra*, 48a. Thus, based on the plain wording of the Regulation, Petitioners' probation *could possibly* be revoked at least in part due to non-payment of the fees.[7] Nor does the fact that the

[6] The foregoing conclusion is inescapable insofar as the *ex post facto* prohibition applies to any retroactive imposition of or increase in a monetary sanction — whether labeled as payment of supervision costs, restitution or a fine — that flows from the commission of an underlying crime. *See* cases cited *supra* note 3; *see also Collins*, 497 U.S. at 51 (*Ex Post Facto* Clause is concerned "with anything to do with the definition of crimes, defenses, or punishments."); *Weaver*, 450 U.S. at 30 (*ex post facto* prohibition forbids imposition of any punishment more severe than that assigned at time offense was committed). Indeed, the First Circuit has recognized this very fact in the context of interpreting the application of § 5E1.2 of the United States Sentencing Guidelines dealing with the imposition of an "additional fine" to pay for an offender's costs of incarceration or supervised release. *United States* v. *Corral*, 964 F.2d 83, 84 (1st Cir. 1992). In comparing the punitive fine provided in § 5 E1.2(a) to the additional fine to pay for the costs of incarceration or supervised release provided under §5 E1.2(i), the First Circuit noted that "'a fine is a fine,'" notwithstanding how it is designated. *Id.* at 84 (quoting *United States* v. *Labat*, 915 F.2d 603, 607 (10th Cir. 1990)).

[7] *See Weaver*, 450 U.S. at 24 (reduction in mandatory gain time which was likely, but not certain, to increase effective term of confinement); *Miller*, 482 U.S. at 423 (increase in presumptive sentencing range for certain sexual offenses); *Lindsey*, 301 U.S. at 397 (maximum sentence changed from discretionary to mandatory); *see also Dobbert* v. *Florida*, 432 U.S. 282, 298-299 (1977). Only retroactive changes which create "the most speculative and attenuated possibility of . . .

supervision fee is imposed by way of a statute separate from the sentence of probation imposed save the challenged provision from *ex post facto* scrutiny in light of this Court's decisions in *Lynce* and *Weaver*.

B. The Decision Conflicts With The Holdings of *Lynce* And *Weaver*.

This Court's recent unanimous ruling in *Lynce* and its 1981 unanimous ruling in *Weaver* both involve the retroactive enhancement of punitive conditions outside the specific sentence imposed similar to the case at bar. In *Weaver*, this Court found that the retroactive reduction in the amount of gain-time awarded for an inmate's good behavior violated the *Ex Post Facto* Clause. Although the statute in *Weaver* did not withdraw any credits already awarded, or curtail the availability of future credits, this Court found that it effectively postponed the date when an inmate would become eligible for early release. 450 U.S. at 33. The *Weaver* Court therefore concluded that the change in the law made more onerous punishment for crimes committed before its enactment contrary to the *ex post facto* prohibition. *Id.* at 35-36. In *Lynce*, this Court held that the retroactive cancellation of early release credits awarded to alleviate prison overcrowding and the consequent reincarceration of the petitioner violated the *Ex Post Facto* Clause. The *Lynce* Court reached this conclusion based on its finding that cancellation of the credits had the *effect* of lengthening the petitioner's period of incarceration. 117 S.Ct. at 896. In reliance on its earlier decision in *Weaver*, the *Lynce* Court rejected the respondents' argument that the challenged statute was not technically part of the sentence and reiterated that provisions which retroactively alter parole and early release terms and thereby increase the punishment imposed violate the *Ex Post Facto* Clause. *Id.* at 898; *see also* discussion *infra* part II.C.

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increasing the measure of punishment for covered crimes" survive *ex post facto* scrutiny. *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597, 1603 (1995).

C. The Decision Conflicts With The Result Reached By The Fifth Circuit in *Sheppard*.

The same result was reached in a similar case by the Fifth Circuit, the only other court of appeals to address the issue of supervision fees. In *Sheppard* v. *Louisiana Bd. of Parole*, 873 F.2d at 761,* the plaintiff sought relief from the imposition of "supervision fees" as a condition of his parole pursuant to a Louisiana statute enacted five (5) years after he committed the underlying offense for which he was placed on parole. In reversing the decision of the district court, the Fifth Circuit found that the plaintiff had raised a colorable constitutional claim for, *inter alia*, violation of the *ex post facto* prohibition. *Id.* at 764. The court further noted that the facts of the case appeared to closely resemble those in *Weaver*. *Id.* at 765. The *Sheppard* court reasoned that a condition of parole consisting of the payment of a supervision fee could be construed as a "punitive condition," the retroactive imposition of which could be found to constitute a violation of the *Ex Post Facto* Clause. *Id.* at 764. The court found that application of the challenged statute to an offender whose crime was committed prior to the statute's enactment, " 'changes the legal consequence of acts completed before [the] effective date' " of the new provision. *Id.* (quoting *Weaver*, 450 U.S. at 31.) Accordingly, the *Sheppard* court reversed and remanded the case to the district court for further proceedings.

D. The Decision Conflicts With Recent Decisions of Numerous State And Lower Federal Courts Upholding *Ex Post Facto* Challenges In Similar Contexts.

The court of appeals' decision also conflicts with recent decisions of numerous state and lower federal courts which have uniformly held that the retroactive application of provisions imposing additional costs, civil assessments and restitu-

*In deciding *Sheppard*, the Fifth Circuit adopted the reasoning set forth in a previously unpublished opinion, *Murray* v. *Phelps*, No. 88-3302 (5th Cir. Feb. 3, 1989), 867 F.2d 1426 (table), which was appended to and incorporated in the *Sheppard* decision. For the sake of brevity and clarity, all references to the *Sheppard* case in the text will be to the facts, reasoning and law as applied by the Fifth Circuit in the unpublished *Murray* v. *Phelps* decision.

tion violates the *Ex Post Facto* Clause. *See* cases cited *supra* note 3. Although with the exception of *Sheppard*, these cases do not involve the precise issue of supervision fees, the reasoning and result reached by the courts in these cases cannot be reconciled with the decision of the court of appeals below. Applying the well-settled *ex post facto* precedents of this Court cited above, these courts had no difficulty holding that the retroactive exactions involved in those cases violated the *ex post facto* proscription.

Accordingly, the decision of the court of appeals conflicts with the foregoing controlling *ex post facto* precedents and must be reversed.

II. The Decision of the Court of Appeals Is Erroneous and Cannot Be Reconciled With This Court's Recent Decision in *Lynce* v. *Mathis* and Therefore Must Be Reversed.

A. Characterization of Supervision Fees as a "Civil Charge" is Erroneous.

The court of appeals, as a preliminary matter, found that imposition of the fees constituted a "civil charge" designed to reimburse the Department for costs directly incurred in supervising probationers and parolees and therefore "comprise[d] no part of any sentence imposed for the crimes committed by [Petitioners]." 101 F.3d at 783, App., *infra*., 7a-8a. This conclusion by the court of appeals is erroneous as a matter of law and fact and contrary to well-settled precedents of this Court.

In this Court's decision in *Weaver*, and again in its recent decision in *Lynce*, this Court rejected arguments that retroactive imposition of a greater punishment was saved from *ex post facto* scrutiny because the challenged provision was not " 'in some technical sense part of the sentence.' " *Lynce*, 117 S.Ct. at 898 (quoting *Weaver*, 450 U.S. at 32). This Court noted in *Weaver* and reiterated in *Lynce* that "retroactive alteration of parole or early release provisions . . . implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term . . . and [the petitioner's] effective

sentence is altered once this determinant is changed.'" *Id.* In the case at bar, offender fees were imposed on Petitioners solely and automatically as a consequence of a criminal conviction and the sentence of probation imposed. Moreover, the fees may *only* be imposed as a result of a criminal conviction.[9] Accordingly, as noted by the district court, the imposition of the fees on Petitioners is inextricably linked to their criminal convictions. 908 F. Supp. at 101, App., *infra*, 24a-25a; *see also Petition of State*, 603 A.2d at 817-818 (where penalties imposed are "annexed to a criminal conviction and cannot be the subject of a separate civil proceeding . . . they are subject to an *ex post facto* restriction").

Accordingly, characterization of the fees by the court of appeals and Respondents as a "remedial" or "civil" charge imposed to defray the expenses of supervision, rather than as a penalty or punishment, does not save these fees from *ex post facto* scrutiny.[10] Where, as here, historically punitive sanctions are involved — monetary payments as well as the possibility of incarceration due to nonpayment — *ex post facto* analysis focuses on the *effect* of the challenged provision, not the purported purpose. Indeed, this Court has looked with disfavor at efforts to disguise criminal punishment under the guise of "legitimate revenue raising purpose[s which] . . . could be equally well served by increasing the fine imposed upon con-

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[9] Although the enabling statute provides that each sentenced offender committed to the Department *shall* reimburse the state for the cost or reasonable portion thereof incurred by the Department as the result of such commitment, the statute contains a specific exclusion which provides that "a person so committed, awaiting trial and not convicted, shall not be liable for the reimbursement." R.I. Gen. Laws § 42-56-38, App., *infra*, 44a. As noted by the district court below, this exclusion makes it clear that the law is not designed solely to provide reimbursement for costs expended by the state, but also to impose an additional burden on those convicted of criminal offenses. 908 F. Supp. at 101, App., *infra*., 23a-24a.

[10] In the same way the First Circuit concluded that a "fine is a fine," *see supra* note 6, Petitioners submit that "punishment is punishment" when monetary penalties are imposed upon an offender arising out of the commission of an underlying crime, however described. Indeed, the First Circuit in *Gilberg*, 75 F.3d at 15, and the Ninth Circuit in *DeSalvo*, 41 F.3d at 505, both found that the retroactive increase in restitution imposed in those cases violated the *ex post facto* prohibition, notwithstanding the fact that restitution serves the undisputably remedial purpose of compensating the victim of a crime. *See United States* v. *Atkinson*, 788 F.2d 900, 903 (2nd Cir. 1986); *United States* v. *Anglian*, 784 F.2d 765, 767 (6th Cir. 1986).

viction." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947 (1994). Moreover, it is well-settled law that the *ex post facto* prohibition protects "against deprivation for *past conduct* by legislative enactment, *under any form, however disguised*." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) at 325 (emphasis added).[11] It is clear that the imposition of a "greater punishment" may violate the *Ex Post Facto* Clause even if it alters punitive conditions outside the sentence, at least where, as here, the additional penalty flows from the commission of the underlying crime. *Lynce*, 117 S.Ct. at 898; *Weaver*, 450 U.S. at 32. Accordingly, the legislature may not escape the restraints of the *Ex Post Facto* Clause merely by imposing supervision fees by way of a separate statute, outside the underlying criminal law violated, and describing the consequences imposed as a civil rather than a criminal penalty.[12] *See* cases cited *supra* note 3.

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[11] *See, e.g., Collins*, 497 U.S. at 46 ("Subtle *ex post facto* violations are no more permissible than overt ones."); *Weaver*, 450 U.S. at 31 ("[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*."); *Beazell*, 269 U.S. at 170 (*ex post facto* prohibition applies to laws "whatever their form" which "after the fact," increase "the nature or amount of punishment imposed"); *Burgess* v. *Salmon*, 97 U.S. at 385 (*ex post facto* prohibition may not be avoided by giving civil form to criminal legislation).

[12] Respondents clearly could not have retroactively imposed a monetary fine on the Petitioners without violating the *Ex Post Facto* Clause. Merely by imposing this exaction on a monthly basis and describing it as an "offender supervision fee" does not somehow exempt this monetary penalty from the proscriptions of the Clause. Moreover, this is the precise result reached by the courts in *Gilberg*, 75 F.3d at 15, and *DeSalvo*, 41 F.3d at 505, under a similar set of facts and formed the basis of the court's conclusion in *Corral*, 964 F.2d at 84, that a "fine is a fine." It is also the same result reached in *Sheppard* and by numerous state and lower federal courts in holding the *ex post facto* prohibition applicable to similar, arguably "remedial" or "civil" penalties. Moreover, payment of the costs of incarceration or supervised release under federal law is clearly considered punishment implicating the *ex post facto* prohibition. *See* United States Sentencing Guidelines § 5E1.2(i). Indeed, the only difference between the supervision fees in this case and the "additional fine" to cover the costs of incarceration or supervised release under § 5E1.2(i) is that the latter fee is imposed at the time of sentencing, while offender fees are automatically assessed as a consequence of an offender being sentenced to a term of probation. Since, in either case, the fees are imposed solely as a consequence of a criminal conviction and the sentence imposed, the foregoing distinction does not immunize offender supervision fees from proscription by the *Ex Post Facto* Clause.

B. Application of the *Halper* test is erroneous.

In concluding that the imposition of the challenged fees on Petitioners did not constitute "punishment" prohibited by the *Ex Facto* Clause, the court of appeals applied a subjective test for defining "punishment" coupled with an objective standard derived from this Court's decision in *Halper*, 490 U.S. at 435. 101 F.3d at 783, App., *infra*, 7a. The court of appeals' application of the foregoing test is erroneous both because this Court's subsequent decision in *United States* v. *Ursery*, 116 S.Ct. at 2135, narrowly restricts application of the *Halper* test to the double jeopardy context, and because the proper test to be applied in the *ex post facto* context focuses on the *effect*, not the purpose, of a challenged provision in accordance with well-settled precedents of this Court.

In *Ursery*, this Court held that *in rem* civil forfeitures do not fall within the proscription of the Double Jeopardy Clause. In doing so, this Court engaged in a detailed analysis and cautioned that very different considerations, and presumably "tests," apply when considering whether "punishment" violates the Excessive Fines as opposed to the Double Jeopardy Clause. This Court further pointed out that even within the context of the Double Jeopardy Clause, different considerations apply in determining whether a particular sanction constitutes a proscribed "punishment," and drew distinctions between *in rem* civil forfeiture, civil monetary penalties, and other forms of civil sanctions, such as the marijuana tax in *Kurth Ranch*, 114 S.Ct. at 1937. The *Ursery* Court took pains to point out that *Halper* involved the determination of "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of *double jeopardy analysis*." 116 S.Ct. at 2143 (emphasis added). On more than one occasion in its decision, the *Ursery* Court went out of its way to point out that *Halper* was limited to the context of a fixed monetary penalty sought in a subsequent civil proceeding, and that the Court did not intend to make a "sweeping change in the law." 116 S.Ct. at 2142-47 and n.2. The Court noted that it had emphasized repeatedly in *Halper* the "narrow scope" of that decision. *Id.* at 2146 n.2. The *Ursery* Court specifically noted that it had never

understood the Excessive Fines Clause of the Eighth Amendment to be "parallel to, or even related to the Double Jeopardy Clause of the Fifth Amendment." 116 S.Ct. at 2146.

Similarly, in the case at bar, to the Petitioners' knowledge, this Court has never held that the *Ex Post Facto* Clause was parallel to or related to the Double Jeopardy Clause. This is so because the lack of notice and legislative restraint, which form the underpinnings of the *ex post facto* prohibition, are fundamentally different than the protection afforded by the Double Jeopardy Clause, which is designed to avoid multiple punishments. *See, e.g., Artway* v. *Attorney General of New Jersey*, 81 F.3d 1235, 1253 n.15 (3rd Cir. 1996). *Ursery* clearly and narrowly restricts application of the *Halper* test to the double jeopardy context, and even then only to situations involving imposition of a fixed monetary penalty. Accordingly, as urged by the Petitioners before the court of appeals and now confirmed by this Court in *Ursery*, the *Halper* test does not apply to the offender supervision fees retroactively imposed on Petitioners in the case at bar, and therefor the court of appeals' reliance thereon is clearly erroneous.[11]

The court of appeals' reliance on the "subjective" test employed in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), is also misplaced. While *DeVeau*, unlike *Halper*, involved an *ex post facto* challenge, the plaintiff in that case was challenging the retroactive application of a non-monetary sanction, specifically a law which barred convicted felons from working on the New York and New Jersey waterfront. Since such a civil disability is not proscribed by the *Ex Post Facto* Clause absent "unmistak-

[11] The precise argument urged by the Respondents and accepted by the court of appeals below that imposition of the fees constituted a "civil charge" and therefore is not subject to the *ex post facto* proscription, was rejected by the court in *Petition of State*, 603 A.2d at 814. In that case, the court noted that *Halper* is inapplicable to a situation, where, as here, the additional penalty is imposed solely as a consequence of a criminal conviction. *Id.* at 817-18. The court further noted that in all cases where the penalties imposed are "annexed to a criminal conviction and cannot be the subject of a separate civil proceeding . . . they are subject to an *ex post facto* restriction." *Id.* at 817. Accordingly, the *Halper* analysis as to whether a nominally civil penalty imposed in a separate civil proceeding constitutes "punishment," is inapplicable where, as here, the offender fees "are connected to, and activated only by, a criminal conviction." *Id.* at 817-818. This is so because such penalties "are part of the 'law annexed to the crime', and limited by the law in effect when the offenses were committed." *Id.* at 818 (citation omitted).

able evidence of punitive intent," *Flemming* v. *Nestor*, 363 U.S. 603, 619 (1960), the test employed by the *DeVeau* court was "whether the *legislative aim* was to punish the individual for past activity, or whether the *restriction of the individual* [came] about as a relevant incident to a regulation of a present situation, such as qualifications of a profession." 363 U.S. at 160 (emphasis added). *DeVeau* merely supports the well-settled proposition that where a *civil disability* is imposed as a result of legitimate regulatory action by the state, it does not constitute an *ex post facto* violation, absent a showing of punitive intent. *See Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595 (1952). Nowhere in *DeVeau* or subsequent decisions has this Court even suggested that the retroactive application of a *monetary exaction* as a direct and automatic consequence of a criminal conviction would not constitute an *ex post facto* violation merely because it was not the *intent* of the legislature to punish. Just as this Court cautioned in *Ursery* that different tests apply in the double jeopardy context depending on whether a monetary or non-monetary sanction is involved, the same rule applies in the *ex post facto* context, with the "subjective purpose" test narrowly restricted to situations involving the retroactive imposition of a civil disability as an incidental result of governmental regulation in a non-penal context.[14] Where punitive sanctions are imposed — in particular monetary exactions or incarceration — solely and automatically as a consequence of a criminal conviction, the proper test to be applied is whether the "effect" is such as to inflict a "greater punishment" on the offender than the law in existence at the time the subject crime was committed.[15]

[14] Similarly, the court of appeals' reliance on three recent court of appeals' decisions, *Bae* v. *Shalala*, 44 F.3d 489 (7th Cir. 1995), *DiCola* v. *Food and Drug Administration*, 77 F.3d 504 (D.C. Cir. 1996), and *Artway*, 81 F.3d at 1235, is also misplaced. Like *DeVeau*, each of these cases involved the imposition of a civil disability, debarment in *Bae* and *DiCola* and registration as a sex offender in *Artway*, and are therefore inapposite to the case at bar. Moreover, contrary to the teaching of *Ursery*, each of these cases erroneously applies the *Halper* test in considering *ex post facto* challenges to the civil disabilities imposed in those cases.

[15] *See Weaver*, 450 U.S. at 31 (effect of law determines whether it is *ex post facto*); *accord*, *Lynce*, 117 S.Ct. at 896-97; *see also* cases cited *supra* notes 2-3. This is so for the obvious reason that, as noted by the district court below, "by simply designating funds for a particular cost or by careful labeling," a state could impose almost any new fine by establishing a nonpunitive or remedial *intent*,

C. *Lynce* v. *Mathis* Compels Reversal

If there was any question previously as to whether the position urged by the Petitioners is correct and the decision of the court of appeals below erroneous, this Court's recent decision in *Lynce* v. *Mathis*, 117 S.Ct. at 891, removes any doubt. In *Lynce*, this Court was called upon to decide whether the retroactive cancellation of early release credits awarded to alleviate prison overcrowding violated the *Ex Post Facto* Clause. The respondents in that case argued that *Weaver* was not controlling because it was the overcrowded condition of the prison system, rather than the character of a prisoner's conduct that triggered the early release credits. *Id.* at 896. In applying the two-part *ex post facto* test, the *Lynce* Court observed that the effect of the challenged provision on the petitioner was clearly retrospective, and that therefore the narrow issue before it was whether the law "disadvantaged the petitioner by increasing his punishment." *Id.* In analyzing whether revocation of the credits constituted "punishment" prohibited by the *Ex Post Facto* Clause, the *Lynce* Court revisited its decisions in *Weaver* and *California Dept. of Corrections* v. *Morales*, 115 S.Ct. 1597 (1995), and concluded that the subjective motivation of the state in enacting the challenged provision was "not relevant to the essential inquiry demanded by the *Ex Post Facto* Clause." 117 S.Ct. at 896. Instead, this Court held the focus must be on the "effect" of the law on a convicted criminal's sentence. *Id.* at 896-97. *Lynce* reaffirmed this Court's previously announced rule in *Weaver* that "retroactive alteration of parole or early release provisions . . . implicates the *Ex Post Facto* Clause." *Id.* at 898 (quoting *Weaver*, 450 U.S. at 32). Accordingly, where, as here, a monetary exaction is imposed solely and automatically as a consequence of a criminal conviction and the sentence imposed, which has the effect of imposing a "greater punishment" on a criminal offender, retroactive application of the exaction is proscribed by the *Ex Post Facto* Clause. Thus, the court of appeals' decision is clearly erroneous and reversal is compelled by this Court's decision in *Lynce*.

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notwithstanding that the *impact* on a criminal offender is no different than if a higher "punitive fine" had been retroactively imposed. 908 F. Supp. at 102, App., *infra*, 26a.

III. This Case Involves the Scope of Protection Afforded By a Fundamental Constitutional Safeguard Against Arbitrary Laws and Its Disposition By This Court Will Have a Profound Effect Nationally On Criminal Offenders Retroactively Subjected to Similar Fees.

In this Court's recent decision in *Lynce*, the Court reiterated that "[t]he presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." 117 S.Ct. at 895. This presumption is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf* v. *USI Film Products*, 114 S.Ct. 1483, 1497 (1994). As noted by Justice Stevens in his dissent in *Morales*, 115 S. Ct. at 1597, the Framers viewed the prohibition against *ex post facto* laws as "one of the fundamental protections against arbitrary and oppressive government."[16] *Id.* at 1606 (footnote omitted) Moreover, the danger of legislative overreaching against which the *Ex Post Facto* Clause was designed to protect is particularly acute where, as here, the target of the legislation is a narrow and unpopular group composed of criminal offenders. *Id.* at 1609. Indeed, this Court has expressed concern that "[t]he Legislature's unmatched powers . . . [and i]ts responsivity to political pressures pose[] a risk that . . . retroactive legislation . . . [may be used] as a means of retribution against unpopular groups or individuals." *Landgraf*, 114 S.Ct. at 1499. This is precisely what happened in the case at bar: fueled by political expediency, the Rhode Island General Assembly has attempted to generate additional revenues to fund the operations of the Department — without raising taxes on the general public — by retroactively imposing a monetary exaction on perhaps the most unpopular of groups — criminal offenders. This is the very type of arbitrary and vindictive,

[16] As noted by Madison, "*ex post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961). Similarly, Hamilton regarded the prohibition as among the three protections which provide "greater security for liberty and republicanism than any [the Constitution] contains." The Federalist No. 84, p. 511 (C. Rossiter ed. 1961).

retrospective legislation against which the *Ex Post Facto* Clause was designed to safeguard. In such cases, the "concerns that animate the *Ex Post Facto* Clause demand enhanced . . . judicial scrutiny." *Morales*, 115 S.Ct. at 1609 (Stevens, J., dissenting).

Moreover, it is clear that however this Court disposes of the Petitioners' within entreaty, this case will have a profound impact which transcends the lives of the five Petitioners or the administration of the Rhode Island Department of Corrections. At least 42 states, many of them recently, have enacted some form of offender fee statute similar to the one at issue (App., *infra*, 65a-67a), which some states have attempted to implement and others may try to implement retroactively in reliance on the court of appeals' decision.[17] Indeed, the court of appeals' decision is an invitation to states to raise revenues through the retroact[illegible] imposition of monetary payments on criminal offenders, which are carefully labeled as "fees for services" in order to exploit the *ex post facto* loophole created by this case. Accordingly, the court of appeals' decision, if left undisturbed, will inevitably precipitate a flood of litigation involving literally tens of thousands of criminal offenders nationally, wherein courts will be forced to adjudicate under what circumstances and in what amounts states may retroactively impose "fees for services" on criminal offenders.[18]

This Court should decline Respondents' invitation to engage in the unprecedented and the arbitrary for the politically expedient purpose of enabling the Department to raise additional revenues to support its operations by retroactively imposing a

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[17] *See, e.g.*, *Matheson* v. *Gorczyk*, No. 2:97-CV-85 (D. Vt. filed March 9, 1997)(*ex post facto* challenge to $30.00 per month probation and parole supervision fees); *Corcoran* v. *State*, No. 96-CV-004360 (Wis. Cir. Ct. March 4, 1997) (summary judgment granted denying *ex post facto* challenge to probation and parole supervision fees of not less than $1.00 per day in reliance on court of appeals' decision below).

[18] Moreover, there is far more at stake here than merely a $15.00 per month supervision fee. The challenged statute also provides for reimbursement of the costs of incarceration. R.I. Gen. Laws § 42-56-38, App., *infra*, 44a. If the arbitrariness and unfairness of the punishment imposed by the retroactive application of the challenged statute is not readily apparent now, its impact will certainly be driven home when the Department attempts to retroactively assess criminal offenders in Rhode Island tens of thousands of dollars for reimbursement of the costs of incarceration.

monetary penalty on perhaps the most unpopular and powerless of groups. Instead, this Court should summarily reverse the court of appeals and reinstate the district court's grant of summary judgment in favor of Petitioners based on well-settled, authoritative decisional law which supports the district court's ruling that imposition of offender supervision fees on Petitioners as an additional condition of probation inflicts a greater penalty than that which was legally provided for at the time Petitioners' crimes were committed, and therefore violates the *Ex Post Facto* Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, Petitioners pray that the writ be granted and that the decision below be vacated and the case remanded for reconsideration in light of this Court's decision in *Lynce* v. *Mathis*.

Respectfully submitted,

RICHARD A. SINAPI
AMERICAN CIVIL LIBERTIES UNION
RHODE ISLAND AFFILIATE
Counsel of Record
V. EDWARD FORMISANO
SINAPI LAW ASSOCIATES, LTD.
100 Midway Place, Suite 1
Cranston, Rhode Island 02920
(401) 944-9690

April 17, 1997

APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 96-1002

WILLIAM L. TAYLOR, ET AL.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, SENIOR U.S. DISTRICT JUDGE]

Before
Torruella, Chief Judge,
Cyr, Circuit Judge,
and Cummings,* Circuit Judge.

Thomas A. Palombo, Special Assistant Attorney General, with whom Jeffrey B. Pine, Attorney General, Rebecca Tedford Partington, Special Assistant Attorney General, and Ellen Evans Alexander, Deputy Chief Legal Counsel, were on brief for appellants.

Richard A. Sinapi, with whom Sinapi Law Associates, Ltd. and American Civil Liberties Union, were on brief for appellees.

December 4, 1996

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*Of the Seventh Circuit, sitting by designation.

CYR, Circuit Judge. The Rhode Island Department of Corrections ("Department") appeals from a district court judgment declaring *ultra vires* and unconstitutional the Department's application of a Rhode Island statute which would impose a monthly offender fee upon the appellees, all of whom were sentenced to probationary terms under Department supervision for criminal offenses committed prior to the effective date of the statute as implemented by regulations promulgated by the Department. The district court held that the Department's interpretation of the statute exceeded its authority under the enabling statute and that the statute, as applied to appellees, violated the *ex post facto* clauses in the United States and Rhode Island Constitutions. We vacate the district court judgment and remand for the entry of summary judgment for appellants on the *ultra vires* and *ex post facto* claims, and for further proceedings on appellees' procedural due process claims.

I

BACKGROUND

Rhode Island General Laws § 42-56-38, P.L. 1992, c. 133, art. 97, § 2, directs that "[e]ach sentenced offender committed to the care, custody, or control of the [Department] shall *reimburse* the state for the cost or the reasonable portion thereof incurred by the state relating to such commitment." (Emphasis added.) The offender fee statute itself *expressly delegates* to the Department the power to determine its effective date by declaring that its provisions "shall not be effective until the date rules and regulations implementing its provisions are filed with the office of the Secretary of State." *Id.*

The Department responded by promulgating, *inter alia*, Regulation 10.07.03, designating *July 1, 1994* as the effective date of the "offender fee" program, following its filing of the implementing regulations with the Secretary of State on June

17, 1994. *See also* R.I. Gen. Laws § 42-56-10(v) (Powers of the director); R.I. Gen. Laws § 42-56-38 (Assessment of costs). The Regulation further provides for "offender fee" waivers based on inability to pay, *see* Regulation § 10.07.03(II)(E), and, in cases of nonpayment, authorizes notification of the appropriate criminal court at any parole or probation revocation hearing, *id.* § 10.07.03(II)(D), as well as civil actions to collect unpaid offender fees, *id.* Mere nonpayment does not constitute a parole or probation violation, however. *Id.* § 10.07.03(II)(D)(3). Nor are offenders in "banked" status (*i.e.*, either residing outside Rhode Island or not on supervised status) liable for the fee, *id.* § 10.07.03(II)(C)(3).

Appellees, all convicted offenders *sentenced to probation prior to July 1, 1994*, each received advance written notice that the $15.00 offender fee would become effective July 1, 1994, and subsequently received monthly bills. Appellees thereafter commenced suit in federal district court claiming that the offender fee statute, as applied, violates the Ex Post Facto and Due Process clauses of the United States and Rhode Island Constitutions. In due course, the parties submitted cross-motions for summary judgment on a stipulated record and the district court ruled that (i) the Department had exceeded its authority under the enabling statute by interpreting the statute so as to render the offender fee retroactive as to appellees and (ii) the statute violated the Ex Post Facto Clause since it retroactively increased the "punishment" for their preenactment crimes. *See Taylor* v. *State of Rhode Island Dept. of Corrections*, 908 F. Supp. 92 (D.R.I. 1995).

II

DISCUSSION[1]

A. *The Ultra Vires Claim*

The district court concluded that the statutory interpretation adopted by the Department exceeded the scope of its delegated authority because it (i) results in an unauthorized "retroactive" application and (ii) would not be accorded deference by the Rhode Island Supreme Court. As the plain language of the statute demonstrates that the Department did not exceed its mandate, we demur.

Under Rhode Island law, it "is well established . . . that statutes and their amendments are presumed to apply prospectively." *Hydro-Manufacturing* v. *Kayser-Roth*, 640 A.2d 950, 954 (R.I. 1994). *See also VanMarter* v. *Royal Indem. Co.*, 556 A.2d 41, 44 (R.I. 1989); *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 869 (R.I. 1987). It is only in the event that "it appears by strong, clear language or necessary implication that the Legislature intended the statute or amendment to have a retroactive effect," *id.*; *see also Pion* v. *Bess Eaton Donuts Flour Co., Inc.*, 637 A.2d 367, 371 (R.I. 1994), that the new enactment "will be interpreted to operate retrospectively." *Avanzo* v. *Rhode Island Dept. of Human Servs.*, 625 A.2d 208, 211 (R.I. 1993).

The statute itself explicitly states that the offender fee "shall not be effective until the date the rules and regulations are filed." R.I. Gen. Laws § 42-56-38. Thus, its plain language requires no interpretation, *see Whitehouse* v. *Rumford Liability & Ins. Co.*, 658 A.2d 506, 508 (R.I. 1995), as it mandates

[1] We review summary judgment rulings *de novo*, and must uphold them if the record, "viewed in the light most favorable to the nonmoving party, reveals no trial-worthy issue of material fact and the moving party is entitled to judgment as a matter of law." *Velez-Gomez* v. *SMA Life Assur. Co.*, 8 F.3d 873, 874-75 (1st Cir. 1993).

prospective application. *See, e.g., Hydro-Manufacturing*, 640 A.2d at 955 (statute which states that it "shall take effect upon passage" evinces plain legislative intent that it be given only prospective application); *Avanzo*, 625 A.2d at 211 (holding that phrase "shall take effect" indicates legislative intent that statute be given prospective effect). As the Rhode Island Legislature explicitly delegated to the Department the responsibility for promulgating and filing the required implementing rules and regulations with the Secretary of State before the offender fee program could take effect, R.I. Gen. Laws § 42-56-38, and there is no claim that the Department failed to comply with the legislative mandate, its designation of a later (July 1, 1994) effective date could not render its interpretation either *ultra vires* or retroactive.[2]

B. *The Ex Post Facto Claim*

The district court awarded appellees summary judgment on their claims that the offender fee statute violates the Ex Post Facto Clause under both the United States Constitution and the

[2] It appears that the district court may have been misled by an ambiguity in the statutory language, which states that the offender fee shall apply to "each sentenced offender *committed* to the care, custody or control of the [Department]." R.I. Gen. Laws § 42-56-38 (emphasis added). The court correctly noted that "[t]he word 'committed' could mean either 'who has been committed,' which would include existing probationers, or 'who is committed,' which would implicate only new probationers." *Taylor*, 908 F.Supp. at 104. However that may be, we suggest, the Department's interpretation cannot be considered *ultra vires*. As the agency responsible for implementing and enforcing the statute, it was entirely appropriate that the Department disambiguate the statutory language. *See Gallison* v. *Bristol Sch. Comm.*, 493 A.2d 164, 166 (R.I. 1985).

We need not decide at this time, however, whether the Department's interpretation of the term "committed" would be material under a due process analysis. *See Avanzo*, 625 A.2d at 208 (retroactive application violates due process); *Lawrence*, 523 A.2d at 864 (due process challenge to explicitly-retroactive legislation); *but see Rhode Island Depositors Economic Protection Corp.* v. *Brown*, 659 A.2d 95, 103 (R.I.), *cert. denied*, 116 S.Ct. 476 (1995) (retrospectively alone does not render statute violative of due process).

Rhode Island Constitution.[3] As the Rhode Island Supreme Court has held that Federal Ex Post Facto Clause jurisprudence likewise guides the required analysis under the Rhode Island Constitution, *Lerner* v. *Gill*, 463 A.2d 1352, 1356 (R.I. 1983), *cert. denied*, 472 U.S. 1010 (1985), these claims merge.

The Ex Post Facto Clause effectively prohibits laws " 'retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.' " *California Dept. of Corrections* v. *Morales*, 115 S.Ct. 1597, 1601 (1995) (quoting *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990)). *See also Hamm* v. *Latessa*, 72 F.3d 947, 956 (1st Cir. 1995), *cert. denied*, 117 S.Ct. 154 (1996). Thus, *ex post facto* laws operate retroactively either to redefine a crime or increase its "punishment." *Morales*, 115 S.Ct. at 1602 n.3. *See also Dominique* v. *Weld*, 73 F.3d 1156, 1162 (1st Cir. 1996).

It would appear that the parties failed to call the district court's attention to significant precedents governing the pivotal determination whether civil fees constitute "punishment." *See Taylor*, 908 F.Supp. at 98. Although it involved a "double jeopardy" claim, *United States* v. *Halper*, 490 U.S. 435 (1989), applies as well in the *ex post facto* context. *See Martel* v. *Fridovich*, 14 F.3d 1, 3 (1st Cir. 1993) (citing *Halper* for the view that a civil sanction is "punishment" only when it serves the aims of retribution or deterrence).[4] As we explained recently, the *Halper* "punishment" test applies to "fines, forfeitures, and other monetary penalties designed to make the sovereign whole for harm or loss that is quantifiable in monetary terms." *United States* v. *Stoller*, 78 F.3d 710, 717 (1st

[3] Article 1, § 10, of the United States Constitution provides: "No State shall . . . pass any . . . ex post facto Law." Article 1, § 12, of the Constitution of the State of Rhode Island reads: "No ex post facto law . . . shall be passed."

[4] Subsequent to the district court decision in this case, the Rhode Island Supreme Court adopted the *Halper* test for determining whether a civil fee constitutes "punishment" under the Double Jeopardy Clause. *See State* v. *One Lot of $8,560*, 670 A.2d 772 (R.I. 1996).

Cir.), *cert. dismissed*, ___ S.Ct. ___ (1996). Since it is clear that the challenged offender fee fits the *Stoller* mold, the *Halper* "punishment" test applies. *See also Artway* v. *Attorney General of State of New Jersey*, 81 F.3d 1235, 1256 n.18 (3d Cir. 1996) (noting that *Halper* test applies because Ex Post Facto Clause serves aims similar to Double Jeopardy Clause); *DiCola* v. *Food & Drug. Admin.*, 77 F.3d 504, 506-07 (D.C. Cir. 1996) (applying *Halper* test to both *ex post facto* and double jeopardy claims); *Bae* v. *Shalala*, 44 F.3d 489, 492-93 (7th Cir. 1995) (employing *Halper* standard to determine whether civil sanction implicates *ex post facto* concerns).

Halper adapted the Supreme Court's longstanding subjective test for defining "punishment," *see DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The question is . . . whether the legislative aim was to punish that individual for past activity."), by coupling it with an objective standard. Accordingly, under the current regime governing civil provisions, we inquire not only whether the legislative *intent* was punitive in nature, but whether the challenged civil provision is "so extreme . . . as to constitute punishment." *Halper*, 490 U.S. at 442.

For purposes of determining whether a law is penal in nature, "the labels 'criminal' and 'civil' are not of paramount importance." *Id.* at 447. Rather, the court must "assess[ ] . . . the [sanction) imposed and the purposes [it] may fairly be said to serve. Simply put, a civil . . . sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment[,]" *id.* at 448; *see Martel*, 14 F.3d at 3; that is to say, retribution and deterrence. *Halper*, 490 U.S. at 448.

On its face, the offender fee statute, suitably located among other Rhode Island civil statutes, imposes a civil charge.[5] The modest fee authorized by the statute comprises no part of any

[5] Our research discloses no relevant legislative history.

sentence imposed for the crimes committed by offenders. Rather, it is expressly designed to "reimburse" the Department for costs directly associated with providing goods and services required to supervise probationers and parolees living in the community. R.I. Gen. Laws § 42-56-38. Moreover, all offender fee revenues are dedicated to such use, Regulation 1.12.01 (IV)(K), and waivers are available to offenders unable to pay, Regulation 10.07.03(II)(E). Finally, the same monthly fee is assessed against all offenders released into the community who are currently under Department supervision, without regard to the nature or severity of their respective offenses.[6] In our judgment, so modest a cost-based supervisory fee reasonably cannot be deemed punitive in *purpose*, especially since any conceivable retributive or deterrent effect could only be inconsequential. *See Martel*, 14 F.3d at 3.

[6] In determining that the offender fee constituted "punishment," the district court ruled that it was part of "the law annexed to the crime," *Calder* v. *Bull*, 3 U.S. 386, 390 (1798), since probation is punishment and the offender fee is linked to appellees' probationary sentences. In our view, this analysis overlooks several determinative distinctions.

First, though a probationary sentence is "punishment," the supervisory services for probationers released into the community are largely rehabilitative, both in nature and purpose. *See* R.I. Gen. Laws § 42-56-4(c) (Organization of department) ("Rehabilitative services shall include . . . intermediary sanctions (including but not limited to . . . probation, parole, restitution, and community service). . . ."). *See also United States* v. *Cardona*, 903 F.2d 60, 62 (1st Cir. 1990) (noting that probation serves goals of rehabilitation and public safety), *cert. denied*, 498 U.S. 1049 (1991); *Tillinghast* v. *Howard*, 287 A.2d 749, 752 (R.I. 1972) ("[I]t is for the purpose of giving a convicted accused the opportunity for rehabilitation that he retains his liberty and is placed on probation."). Second, the monthly fee is not imposed on all offenders sentenced to probation, but only those actually receiving the supervisory services whose costs are defrayed by the fee. Regulation 10.07.03(II)(C)(3).

Thus, the offender fee differs materially from the fees at issue in a case relied upon by appellees and cited by the district court, *see In re Petition of Delaware for a Writ of Mandamus*, 603 A.2d 814 (Del. 1992), in which monetary sanctions were imposed on the offenders *at sentencing*. The fees involved in that case were blanket surcharges, calculated as percentages of the criminal penalty, fine, or forfeiture imposed at sentencing, rather than reimbursements for the costs of providing services to the offenders. As the *Halper* Court explained, "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Halper*, 490 U.S. at 447 n.7.

Finally, we inquire whether the fee nonetheless runs afoul of the objective test announced in *Halper*: a monetary assessment "that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term." *Halper*, 490 U.S. at 448. Under this standard, the offender fee must be deemed "punitive" if it "bears no rational relation to the goal of compensating the [State] for its loss." *Id.* at 449.[7] To state the question in this case is to answer it.

The offender fee statute mandates that "[m]onies received under this section will accrue first to the department of corrections for use to offset costs of the specific care or service." R.I. Gen. Laws § 42-56-38. The implementing regulations in turn make clear that the offender fee was rationally designed to promote its legislative objective; *viz.*, reimbursement of the Department for its costs in providing the required supervisory services to its probationers and parolees. Regulation 1.12.01(IV)(K). Furthermore, the implementing regulations explicitly state that the offender fees collected from probationers and parolees must be deposited in a restricted account, exclusively available for defraying Department costs in affording offenders the required community supervision.[8] Thus, the legislative intent actuating the offender fee program is entirely

[7] We note no contention, and no evidence, that the $15.00 monthly fee exceeds the costs associated with providing Department supervision of offenders released into the community. *See Halper*, 490 U.S. at 452.

[8] Moreover, as already noted, *see supra* p. 3, the offender fee is imposed only on probationers and parolees currently under Department supervision in the community, not upon probationers in "banked" status. Regulation 10.07.03(II)(C)(3). Thus, rather than a blanket fee assessed at sentencing without regard to the commencement or duration of any term of community supervision, the Rhode Island offender fee is directly and rationally related to recouping the State's costs in providing supervision to the individual offenders for whose benefit the services are rendered. *Cf. In re Petition of Delaware for a Writ of Mandamus*, 603 A.2d 814 (Del. 1992); note 4 *supra*.

remedial and its practical effect is neither retributive nor deterrent in nature. Under the *Halper* test, therefore, the offender fee is not punitive.[9]

III

CONCLUSION

For the foregoing reasons, the district court judgment is reversed and the case is remanded for further proceedings on appellees' procedural due process claims under state and federal law. The parties shall bear their own costs.

SO ORDERED.

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[9]The fact that nonpayment of the fee can be brought to the attention of the court at a parole/probation revocation hearing, *see supra* p. 3, does not transform the fee into punishment. While revocation of parole/probation might constitute punishment, the Supreme Court explained in *Morales* that courts must determine whether a legislative change "produces a sufficient risk of increasing the measure of punishment." *Morales*, 115 S.Ct. at 1603. A legislative change which creates only a "speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment" is insufficient to raise the *ex post facto* specter. *Id.* As the district court recognized, any possible link between nonpayment of the offender fee and the revocation of parole/probation is too attenuated to render the offender fee violative of the Ex Post Facto Clause, *Taylor*, 908 F.Supp. at 101, especially since *inability to pay* constitutes grounds for waiver.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM L. TAYLOR, MARY-ANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL L. BOURGET, and DAVID A. WEBB

v. C.A. No. 94-0596-P

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS, and GEORGE A. VOSE, JR., Individually and in his official capacity as Director of the Rhode Island Department of Corrections

MEMORANDUM AND ORDER

PETTINE, Senior Judge. Now before this Court are the plaintiffs' and defendants' cross Motions for Summary Judgment. This case concerns Rhode Island Department of Corrections Regulation 10.07.03 ("the Regulation"), which imposes a monthly supervision fee on criminal offenders sentenced to probation or parole. The plaintiffs challenge the constitutionality and statutory authority for the application of the Regulation to offenders who were sentenced to probation prior to the Regulation's effective date. All of the plaintiffs in this case are probationers who were so sentenced. They contend that this imposition of supervision fees violates the prohibition against *ex post facto* laws under Article I § 10 of the United States Constitution and Article I § 12 of the Rhode Island Con-

stitution, as well as the plaintiffs' substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article 1 § 2 of the Rhode Island Constitution. The plaintiffs bring their federal constitutional claims pursuant to 42 U.S.C. § 1983 and their state constitutional claims directly under the Rhode Island Constitution. The plaintiffs also allege that Regulation 10.07.03, as applied retrospectively to previously sentenced probationers, exceeds the authority granted to the Department of Corrections by R.I. Gen. Laws § 42-56-38. The plaintiffs move for declaratory judgment, injunctive relief, and compensatory damages. The defendants object and further argue that the defendant George Vose, Jr. is entitled to immunity from suit in his indi vidual capacity.

For the reasons which follow, this Court grants the plaintiffs' Motion for Summary Judgment on the *ex post facto* and statutory authority issues, grants the defendants' Motion for Summary Judgment on the substantive due process claim, denies both the plaintiffs' and the defendants' Motions for Summary Judgment on the procedural due process claim, and grants the defendant George Vose, Jr.'s Motion for Summary Judgment as to his qualified immunity. Because the Regulation's application to the plaintiffs is held invalid on *ex post facto* and statutory authority grounds, the merits of the plaintiffs' procedural due process claim need not be resolved.

I.

STATEMENT OF FACTS

Rhode Island General Laws § 42-56-38, as enacted by P.L. 1992, c. 133, art. 97, § 2, provides that each sentenced criminal offender committed to the care, custody, or control of the Department of Corrections, including but not limited to those on probation or parole, is required to reimburse the State for the

costs of services provided, or a reasonable portion thereof. This statute specifically provides that its provisions shall not be effective until the date that rules and regulations implementing its provisions are filed with the Secretary of State. On June 17, 1994, subsequent to a public hearing, the Department of Corrections filed Regulation No. 10.07.03, entitled "Adult Probation and Parole Offender Supervision Fees," with the Secretary of State. The Regulation states that a monthly fifteen dollar supervision fee will be assessed on probationer and parolees, effective July 1, 1994. The Regulation also provides for a waiver of the supervision fee if the offender demonstrates financial hardship to probation or parole staff.

The plaintiffs, William L. Taylor, Maryanne Silva, Raymond W. Christiansen, Lionel Bourget, and David A. Webb, were all convicted and sentenced to probation with the Department of Corrections before July 1, 1994. On June 19, 1994, George Vose, Jr., Director of the Department of Corrections, sent a letter to all probationers and parolees notifying them that the fifteen dollar fee would be imposed beginning July 1, 1994. The letter made no mention of available waivers for financial hardship. Each plaintiff was assessed offender supervision fees after July 1, 1994. All the plaintiffs have alleged that they contacted their probation offices inquiring about the obligations to pay the fee and that they were not informed about the available waiver procedure. The defendants assert that the plaintiffs never requested waivers.

Those plaintiffs who have been delinquent in paying their supervision fees have received monthly notices containing the words "FINAL NOTICE" and advising that a civil action would follow if the fees were not paid in full. The agency collecting the supervision fees may sue for any delinquent payments, even after the term of probation has ended. The regulations provide that probation shall not be violated solely for nonpayment of fees, but that if other violations occur, the court, in

deciding to revoke probation, may consider nonpayment as indicating a pattern of non-compliance.

The plaintiffs claim that the imposition of supervision fees on those who were sentenced to probation prior to the effective date of the Regulation violates the *Ex Post Facto* Clause and the Due Process Clause, as well as exceeding the statutory authority of R.I. Gen. Laws § 42-56-38. The plaintiffs seek a declaratory judgment that the regulation as imposed is invalid, an injunction prohibiting the defendants from collecting supervision fees from the plaintiffs, and an order requiring reimbursement of fees previously collected from the plaintiffs. Based on the Agreed Statement of Facts, the plaintiffs and the defendants have filed cross Motions for Summary Judgment, which are now before this Court.

II.

SUMMARY JUDGMENT

A federal court may grant summary judgment in a civil action "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if it could be legally relevant to the outcome of the case. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). To prevent summary judgment, the evidence, viewed in the light most favorable to the non-moving party, must be sufficient to permit a rational factfinder to resolve the issue in favor of either side. *Id.*; *Mack* v. *Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989). In this case, the parties have stipulated to an Agreed Statement of Facts for the purposes of summary judgment. Given this stipulation, no genuine issue of material fact exists relating to the dispositive *ex post facto* and statutory

authority claims. As discussed below, several material facts relating to the procedural due process claim are disputed or absent. However, since the regulation as applied to the plaintiffs is now held invalid on other grounds, the merits of the plaintiffs' procedural due process claim need not be resolved.

III.

QUALIFIED IMMUNITY

Qualified immunity shields government officials who are exercising discretionary powers "from [personal] liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow* v. *Fitzgerald*, 475 U.S. 800, 818 (1982); *Hegarty* v. *Somerset County*, 53 F.3d 1367 (1st Cir. 1995). The focus of this standard is the "objective reasonableness of an official's conduct as measured by reference to clearly established law." *Harlow*, 475 U.S. at 818. In *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), the Supreme Court explained that qualified immunity shields such government officials from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638 (citation omitted). The government official's belief need not, however, be correct; qualified immunity doctrine "allows for the inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable.'" *Hegarty*, 53 F.3d at 1373 (quoting *Anderson*, 483 U.S. at 641) (emphasis omitted).

The plaintiffs contend that the defendant George Vose, Jr., Director of the Department of Corrections, deprived the plain-

tiffs of their constitutional rights by implementing an *ex post facto* law and by denying procedural and substantive due process to the plaintiffs. These constitutional guarantees stand inviolate, and I can safety conclude that Mr. Vose knew or should have known of these protections.

I need not discuss here Mr. Vose's immunity with regard to the procedural and substantive due process claims, as I find, *infra*, that the plaintiffs' substantive due process rights were not violated and that I cannot and need not resolve the merits of the plaintiffs' procedural due process claims. With regard to the application of the *Ex Post Facto* Clause, however, I find that Mr. Vose reasonably could have concluded, even if mistakenly, that his conduct was lawful, and therefore he is entitled to qualified immunity. Although the *ex post facto* guarantee is certainly "clearly established," the question of whether an offender supervision fee such as the one imposed upon the plaintiffs falls under the scope of the *Ex Post Facto* Clause is not so clear cut. Even though I ultimately find that the Regulation did violate the *Ex Post Facto* Clause, I note that this is a difficult case to which no binding case law applies. The question before this Court is a complex one, involving close and careful consideration of constitutional issues in a factual situation which has never been considered by the First Circuit or the Supreme Court. This Court cannot, under the generous qualified immunity standard discussed above, charge Mr. Vose with the legal refinements involved in reaching such a conclusion. Thus I find that he is entitled to qualified immunity.

IV.

EX POST FACTO

A critical question in this case is whether the defendants' imposition of the probation supervision fee upon the plaintiffs

was in violation of the *Ex Post Facto* Clause of the United States Constitution and the Rhode Island Constitution.[1] Since the Rhode Island Constitution's *Ex Post Facto* Clause is essentially identical and has been interpreted as requiring the same standard as under the United States Constitution, *Lerner* v. *Gill*, 463 A.2d 1352, 1356 (R.I. 1983), I address these claims together.

In *Collins* v. *Youngblood*, 497 U.S. 37 (1990), the United States Supreme Court discussed in some detail the current scope of the *Ex Post Facto* Clause. The *Collins* Court further reaffirmed the Court's summary of the meaning of the *Ex Post Facto* Clause in *Beazell* v. *Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; *which makes more burdensome the punishment for a crime, after its commission*, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited *ex post facto*.

Collins, 497 U.S. at 42 (quoting *Beazell*, 269 U.S. at 169-70) (emphasis added). *Collins* confirmed that these three *Beazell* categories define the scope of the *Ex Post Facto* clause, stating that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause."[2] *Id.* at 43.

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[1] Art. 1 § 10 of the Constitution provides in part: "No State shall . . . pass any . . . ex post facto Law. . . ."

[2] The *Collins* Court also looked to Justice Chase's opinion in *Calder* v. *Bull*, 3 U.S. 386, 390 (1798) for an early explanation of the "core concern" of the *Ex Post Facto* Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such

In the present case, the plaintiffs do not attack the validity of their convictions or punishments as originally imposed. Therefore, the legal issue here is whether the challenged provision imposing the monthly offender supervision fee on the plainfiffs "makes more burdensome the punishment for a crime, after its commission." *Id.* at 42 (quoting *Beazell*, 269 U.S. at 169-70). The plaintiffs argue that the supervision fee flows from the commission of the underlying crime and that the fee is punitive, as an additional requirement or condition of probation. The defendants assert that the fee is not criminal punishment but rather a civil surcharge.

I note, at first, that no binding case law comes to bear directly upon this issue. Although the Supreme Court has recently discussed the scope of the *Ex Post Facto* Clause in *Collins* and the even more recent *California Dep't of Corrections* v. *Morales*, ___ U.S. ___, 115 S.Ct. 1597 (1995), neither of these opinions sheds light on the question of when an additional fee which is related to an already-imposed punishment makes that punishment "more burdensome." In *Collins*, a trial court jury had imposed upon respondent Youngblood a punishment of life imprisonment and a fine of $10,000. *Collins*, 497 U.S. at 40. However, the fine was not authorized by law; thus, under Texas law at the time, the judgment and sentence were void and Youngblood was entitled to a new trial. Subsequent to Youngblood's conviction, however, a new state statute became effective, allowing an appellate court to reform an improper jury verdict rather than grant a new trial. The appellate

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> action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

Collins, 497 U.S. at 42 (quoting *Calder*, 3 U.S. at 390) (emphasis in original).

court to which Youngblood had applied for a new trial thus reformed Youngblood's conviction by deleting the $10,000 fine and, correspondingly, denied his request for a new trial. *Id.*

Youngblood challenged the new statute as a violation of the *Ex Post Facto* Clause. The Supreme Court's discussion focused on whether a legislative change violates the *Ex Post Facto* Clause even if it does not actually change the amount of the punishment. For, the Court in *Collins* distinctly pointed out that the challenged legislation was simply a "procedural change" which did not "alter the definition of the crime of aggravated sexual abuse, of which Youngblood was convicted, nor [did] it increase the punishment for which he [was] eligible as a result of that conviction." *Collins*, 497 U.S. at 44. The point of *Collins* was that a legislative change does not violate the *Ex Post Facto* Clause unless it meets one of the three categories outlined in *Beazell*. In *Collins*, the appellate court's decision of the fine and corresponding denial of a new trial clearly did not fall within any of these three categories; it simply changed the procedure for correcting an improper punishment, which in no way increased (and, in fact, decreased) the burden of Youngblood's punishment.

In coming to this conclusion, *Collins* rejected the notion that a legislative change violates the *Ex Post Facto* Clause if it merely "in relation to the offence [*sic*] or its consequences, alters the situation of a party to his disadvantage." *Collins*, 497 U.S. at 48-49 (quoting *Kring* v. *Missouri*, 107 U.S. 221, 228-29 (1883) (emphasis omitted)). *Collins* explicitly overruled *Kring*, stating:

> The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the

> meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases.

Id. at 50. The *Collins* Court also overruled *Thompson* v. *Utah*, 170 U.S. 343 (1898), which involved the Sixth Amendment right to trial by jury and the question of whether the state of Utah could retrospectively take away the Sixth Amendment right to a 12-person jury when it became a State rather than a Territory and was therefore "no longer bound by Sixth Amendment as then interpreted." *Collins*, 497 U.S. at 51. In overruling *Thompson*, the Court stated that, to violate the *Ex Post Facto* Clause, it was not enough that a "substantial right" be taken away as a result of the legislative change. *Id.* The *Collins* Court noted, "The right to a jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Id.* In the present case, the plaintiffs have not merely been placed at a procedural disadvantage or been denied a substantial right unrelated to their punishment. Instead, the probation supervision fee at issue directly relates to and concretely affects the plaintiffs' punishment.

Collins, therefore, did not address the question presented in the instant case, which is whether imposing supervision fees on probationers already sentenced falls within the categories laid out in *Beazell*. The holding of *Collins* is simply that, to be a violation of the *Ex Post Facto* Clause, a statute must come within "the finite *Beazell* categories." 497 U.S. at 44. The Texas statute at issue in *Collins* clearly did not; thus, the Court did not address the nuances of the particular *Beazell* categories, as is necessary in the instant case in order to determine whether the supervision fee "makes more burdensome the punishment for [the plaintiffs' crimes], after [their] commission."

Morales also involved an *Ex Post Facto* Clause issue but fails to shed light on the present case. The facts of *Morales* involved a change in parole hearing procedure; a legislative amendment had retrospectively changed the frequency of parole suitably proceedings available to the respondent. *Morales*, 115 S.Ct. at 1600. Unlike *Collins*, the *Morales* Court did address the question of whether this change increased the measure of the prisoner's punishment. However, in holding that the change did not violate the *Ex Post Facto* Clause, the Court focused entirely on the fact that the change created only a "*speculative and attenuated possibility* of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Morales*, 115 S.Ct. at 1603 (emphasis added). This focus was based upon the Court's holding in *Beazell* that "the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.' . . . [I]n evaluating the constitutionality [of the amendment at issue], we must determine whether it produces a *sufficient risk* of increasing the measure of punishment attached to the covered crimes." *Morales*, 115 S.Ct. at 1603 (quoting *Beazell*, 269 U.S. at 171) (emphasis added). The subsequent discussion made clear that *Morales*' holding that the change in parole hearing procedure was not of "sufficient moment" was a result of the *uncertainty* of its effect upon the prisoner's punishment, rather than the *inadequacy* of its burdens.

In the present case, the defendants argue that under *Morales*, the fifteen dollar monthly fee, with its liberal waiver criteria and provisions for retroactive waivers, does not transgress any of the plaintiffs' constitutional rights. However, this argument mischaracterizes the nature of *Morales*' admonition regarding the necessary "matter of 'degree.'" It turns the issue into one of the *heaviness* of the burden, rather than the *certainty* of the burden, as discussed in *Morales*. *Morales* in no way indicates

that the "matter of 'degree' " is one of quantity rather than one of certainty. It presents none of the discussion that one would expect from the establishment of a new threshold standard. It does not discuss how courts might decide when the burden is sufficiently heavy to amount to a constitutional violation or present any factors to consider in making such a determination.

Even if an *ex post facto* punishment must meet a minimum threshold of onerousness in order to be constitutional, the supervision fee at issue in this case would clearly meet any such threshold. As the plaintiffs point out, they face total supervision fees ranging from $180.00 to $1,620.00, even without any increases in the monthly fee amount. These are not insignificant amounts of money. While these amounts may not be onerous to all, they are certainly not insignificant. Furthermore, the fact that the fee can be waived for those who cannot afford it does not lessen the certainty of the fee's burden on those who do not meet the waiver criteria. Even those who can afford to have their rights violated are entitled to constitutional protections.

Thus, I return to the critical question in this case: does the fee "make more burdensome the punishment for the crime?" A logical analysis of the nature of the supervision fee leads inexorably to the conclusion that it does actually increase the burdens of the punishment. The plaintiffs in this case were placed on probation as a result of convictions for either felonies or misdemeanors. Thus the probation was, for each plaintiff, part of his or her punishment for the offense. Under both state and federal law, probation is clearly considered to be punishment. *See, e.g.*, R.I. Gen. Laws § 12-19-23.2 (1994 Reenactment) (listing various "intermediate punishments," including probation); *United States* v. *Bynoe*, 562 F.2d 126 (1st Cir. 1977) ("[P]robation is . . . a punishment imposed on the defendant, albeit a mild one. . . .") (citing *Korematsu* v. *United States*, 319 U.S. 432 (1943)). At the time the plaintiffs were convicted

in all cases, before July 1, 1994, when the supervision fee went into effect), they received sentences, including probation, which did not include any imposition of a monetary payment. Thus, each plaintiff's punishment was made significantly more burdensome than it was at the time of sentencing as a result of the imposition of the fee. That is, the punishment include the probation, and the fee makes the probation more burdensome. Logically, therefore, the retrospective fee "makes more burdensome the punishment."

Looking at this another way, probation inherently involves the imposition of a series of conditions which impose constraints upon and restrict the behavior of probationers. The expectation of such conditions accompanied the plaintiffs' original sentences. The supervision fee, however, is a condition of probation different from ordinary probation conditions. It is not merely a change in supervision policies or procedures but is rather a direct imposition of a substantial monetary obligation. This obligation is thus clearly an additional imposition far beyond the scope of the already-existing supervisory and conduct-oriented conditions of probation. Added after plaintiffs were already convicted and sentenced, it increases the burdens of the punishment in a very direct and concrete way.

The defendants argue that the supervision fee is not actually "punishment" but instead merely a civil fee which offsets the costs of services. This argument is severely undermined by an exclusion contained within the law itself. The law states, "Each sentenced offender committed to the care, custody, or control of the department of corrections shall reimburse the state for the cost or the reasonable portion thereof incurred by the state relating to such commitment." R.I. Gen. Laws § 42-56-38. However, the statute explicitly states, "provided however that a person so committed, awaiting trial and not convicted, shall not be liable for the reimbursement." *Id.* This exclusion makes

clear that the law is not intended solely to provide reimbursement for costs expended by the state; if it were, then all persons upon whom those costs were expended would be liable, regardless of whether they ultimately were convicted. Such a result would, of course, be inappropriate. Instead, the law makes a clear distinction, as it must, between those who have been convicted and those who have not. This distinction makes the fee, at least in part, punitive in its intent and purpose.

Furthermore, the law makes clear that nonpayment of the supervision fee could be a factor taken into account in revoking the plaintiffs' probation, even though it could not be the sole cause. The Regulation states:

> The offender's probation or parole shall not be violated solely for non-payment of offender fees. However, in the event of other violations of the conditions of probation/parole, non-payment of the offender fees may be brought to the attention of the court, formally or informally, as indicative of a lack of cooperation, failure to fulfill lawful obligation, or other patterns of non-compliance.

Department of Corrections Regulation 10.07.03(II)(D)(3). Under the holding of *Morales* discussed, *supra*, this possible link between non-payment of the fee and revocation of probation is too speculative and attenuated, in and of itself, to make the fee a violation of the *Ex Post Facto* Clause. However, the role of the fee in probationers' on-going interactions with the criminal justice system belies its alleged purely civil nature.

I note further that the probation supervision fee, even if it does serve the non-punitive goal of offsetting financial costs to the State, is inextricably linked to the plaintiffs' criminal convictions. The fact that these fees do not and could not be applied independent of a criminal conviction points strongly to

the conclusion that they cannot be viewed as civil fees. They are part of the "law annexed to the crime," *Calder* v. *Bull*, 3 U.S. 386, 390 (1798), and therefore are limited by law in effect when the offenses were committed under the *Ex Post Facto* Clause. *See, e.g., In the Matter of the Petition of Delaware for a Writ of Mandamus*, 603 A.2d 814, 817-18 (Del. 1992) (holding that imposition of assessment to be paid to Drug Rehabilitation Fund and increase in assessment to be paid to Victim Compensation Fund were penal in nature and violated *Ex Post Facto* Clause).

The defendants also present case law indicating that such supervision fees are, in general, legal. For instance, the defendants cite *Turner* v. *Nevada Bd. of State Prison Comm'rs*, 624 F.Supp. 318 (D. Nev. 1985), for the proposition that the costs of supervision or imprisonment may be imposed on prisoners. However, in the present case, the plaintiffs do not dispute the constitutionality of these fees in general but only when applied *ex post facto*. Thus the case law the defendants cite regarding the propriety of the fees, independent of an *ex post facto* analysis, is immaterial.

The defendants also rely heavily on the unappealed, unpublished magistrate's recommendation in *Murray* v. *Phelps*, C.A. No. 88-0129-A (M.D. La. 1993), in which the plaintiffs were represented *pro se*. *Murray* held that a statutory authorization for the payment of parole supervision fees was not a violation of the *Ex Post Facto* Clause. *Id.* I note, first, that this decision is in no way binding precedent for the present case. Furthermore, the *Murray* court discussed extensively the significance of the fact that the *parole* was not part of the plaintiffs' original sentences but was instead a *reduction* in the plaintiffs' original sentences. It pointed out that "[a] prisoner has no constitutionally protected liberty interest in diminution of or release prior to the expiration of a valid sentence," *id.* at 10 (citing *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*,

442 U.S. 1 (1979)), and that "[s]ince a prisoner has no right to diminution of sentence, the State is free to fashion the manner under which it may be granted," *id.* (quoting *McGhee* v. *Belisle*, 501 F.Supp. 189 (E.D.La. 1980)). The present case, on the other hand, involvers *probation*, which was part of the plaintiffs' original sentences. Thus, the probation supervision fee is an increase in the burdens of the original punishment, rather than a condition upon the plaintiffs' receipt of a decrease in punishment, as in *Murray*.

The *Murray* court states in a conclusory manner that the fee is not punitive because it is "imposed for the purpose of defraying the expense of supervising the parolee." *Id.* at 10. The court presents no substantiation for this assertion, and I therefore fail to find it persuasive. This type of conclusory analysis lead to a "slippery slope," where a state could, by simply designating funds for a particular cost or by careful labeling, impose almost any new fine without being subject to the constraints of the *Ex Post Facto* Clause.

The defendants also argue that the offender supervision fees are not retrospective and that they "are applied prospectively to persons receiving probation and parole services." However, this assertion obfuscates the true nature of the fees. All the plaintiffs in this case indisputably committed their crimes before the law went into effect. The law thus imposes an additional burden upon the plaintiffs that did not exist at the time of their actions which led to the convictions. In *Weaver* v. *Graham*, 452 U.S. 24 (1981), the Supreme Court noted that a statute may be considered retrospective "even if it alters punitive conditions outside the sentence itself." *Id.* at 32. It is immaterial that the supervision fee is not a direct increase in the term or burdens of the original sentence itself. Instead, the fee is a collateral enhancement of the burdens of the sentence, and it clearly "attaches legal consequences to a crime committed before the law took effect," *Weaver*, 450 U.S. at

31. Thus, it is retrospective for the purposes of the *Ex Post Facto* Clause.

Finally, basic constitutional considerations dictate that I find that the offender supervision fee violates the *Ex Post Facto* Clause. Through the *Ex Post Facto* Clause, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28-29 (citing *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977)). This fundamental consideration bears heavily on the present case. When the plaintiffs in this case committed their offenses and were sentenced to punishment which included probation, they had neither warning nor expectation that the probation would involve paying out sums of money. Traditionally, probation conditions are those of *supervision*, of being monitored for good behavior and subjected to potentially greater penalties for misconduct. In the present case, plaintiffs simply could not have known that they would have monetary payments imposed upon them as a direct legal consequence of their probation. Thus they had neither fair warning of the monetary imposition nor the ability to rely upon the expectation of traditional probation conditions. Instead, the plaintiffs were taken by surprise when the supervision fee was imposed upon them, after they already had been convicted and sentenced for their offenses. This results undermines the fundamental tenets of the *Ex Post Facto* Clause. I note again that I am not finding the fee unconstitutional when applied prospectively but only as applied to those offenders sentenced to probation before the effective date of the Regulation.

For the foregoing reasons, the defendants' Motion for Summary Judgment is denied and the plaintiffs' Motion for Summary Judgment is granted on the *ex post facto* question.

V.

STATUTORY AUTHORITY

The plaintiffs allege that the Department of Corrections' imposition of probation supervision fees exceeds the statutory authority of R.I Gen. Laws § 42-56-38. They argue that the statute does not provide any authority for levying supervision fees on people sentenced to probation prior to its effective date. The statute itself states only that its provisions "shall not be effective until the date the rules and regulations are filed with the office of the secretary of state." R.I. Gen. Laws § 42-56-38. Yet, the Department of Corrections has applied the supervision fee to all probationers, including those sentenced to probation prior to the statute's effective date.

According to Rhode Island courts' interpretation of their own laws, "[a]s a general rule statutes operate prospectively from and after the effective date of the statute. It is only in the event that a statute contains clear and explicit language requiring retroactive application that a statute will be interpreted to operate retrospectively." *Avanzo* v. *Rhode Island Dep't of Human Serv.*, 625 A.2d 208, 211 (R.I. 1993); *see Walsh* v. *Rhode Island Dep't of Transp.*, 637 A.2d 774, 775 (R.I. 1994); *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 869 (R.I. 1987). According to one court case, an exception to this presumption of prospective application exists for statutes deemed "procedural in nature." *Norton* v. *Paolino*, 113 R.I. 728, 733, 327 A.2d 275, 278 (1974). In *Norton*, the court found that a statute authorizing the substitution of a deceased motorist's insurer as defendant was substantive in nature because it affected the insurer's liability. *Id.* at 733-34. In the present case, the imposition of probation supervision fees is substantive in nature, since the law affects the plaintiffs' property rights. As in *Norton*, the statute creates new susceptibility to suit and potential liability by allowing a probationer to

be sued civilly for nonpayment of the fee. Thus, under Rhode Island statutory interpretation, the ambiguity of the statute regarding retroactive application requires that the statute apply only prospectively.

The defendants argue, however, that the statute's interpretation by the Department of Corrections, as the governmental agency charged with enforcing this statute, must be given deference. Under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, when the meaning of a statute is unclear, a federal agency's interpretation of the statute should be given deference if its interpretation is reasonable. 467 U.S. 837, 843-45 (1984). The defendants argue, correctly, that the statute in this case is ambiguous as to whether it applies to probationers who were sentenced prior to its effective date. The *Chevron* doctrine was discussed by the Rhode Island Supreme Court in only one case, *Pawtucket Power Assoc. Ltd. Part.* v. *City of Pawtucket*, 622 A.2d 452, 456 (R.I. 1993), in which the court deferred to a declaratory judgment of the Public Utilities Commission finding that the appellant was not a "public utility."

The one Supreme Court case that has addressed agency interpretation of retroactivity did not give that interpretation deference. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). *Bowen* involved the Department of Health and Human Services' retroactive application of a Medicare administrative rule. The Court held that retroactive application was disfavored and that statutes would be presumed to apply prospectively unless expressly worded otherwise. *Id.* at 208. The Court also stated,

> a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by the Congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, court should

> be reluctant to find such authority absent an express statutory grant.

Id. at 208-09.[3] The Court refused to grant the agency deference because its interpretation was unsubstantiated and inconsistent. *Id.* at 212-13. The Supreme Court's disapproval of retroactive statutory interpretation was made even more evident in *Landgraf* v. *U.S.I. Film Products*, which held that the Civil Rights Act of 1991 could not be applied retroactively. ___ U.S. ___, 114 S.Ct. 1483 (1994). The Court held that a statute would not be applied retroactively unless the legislation makes that intent clear, stating: "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary consideration of fairness dictate that individuals should have an opportunity to know that what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 1497. The Court expressed concern with the result of retroactive legislation: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* Because the Supreme Court has expressed strong disapproval of retroactive laws generally and has not deferred to agency interpretation of retroactivity, no deference need be accorded the Department of Corrections in its interpretation of R.I. Gen. Laws § 42-56-38.

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[3] The *Bowen* decision appears to be in tension with *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696 (1974), which held that changes in the law should be applied to pending appellate cases. The Supreme Court has explained subsequently that *Bradley* is limited to laws relating to prospective relief, jurisdiction, or procedure. *Landgraf* v. *U.S.I. Film Products*, ___ U.S. ___, 114 S.Ct. 1483, 1501-04 (1994). Since, as discussed earlier, R.I. Gen. Laws § 42-56-38 is not a procedural law, the *Bradley* holding is inapplicable.

Moreover, the First Circuit has expressly recognized the limitations of *Chevron* deference:

> In this realm of judicial expertise, the courts, not the agency, have the last word . . . At any rate, the true measure of a court's willingness to defer to an agency's interpretation of a statute "depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances." *Massachusetts Dep't of Educ.* v. *United States Dep't of Educ.*, 837 F.2d 536, 541 (1st Cir. 1988). "The simple fact that the agency has a position, in and of itself, is of only marginal significance." *Mayburg* v. *Secretary of HHS*, 740 F.2d 100, 106 (1st Cir. 1984).

United States v. *29 Cartons of an Article of Food*, 987 F.2d 33, 38 (1st Cir. 1993). Because the Rhode Island Supreme Court has mentioned *Chevron* in only one case, *Pawtucket Power*, 622 A.2d at 456, it is unclear that Rhode Island law requires such deference. In *Avanzo*, the case involving the Rhode Island Department of Human Services' implementation of a retroactive welfare regulation, the court never discussed or granted *Chevron* deference to the agency's statutory interpretation. Therefore, I believe that if this issue were before the Rhode Island Supreme Court, it would evaluate the reasonableness of the Department of Corrections' interpretation of R.I. Gen. Laws § 42-56-38 without granting the Department deference.

The statute in question applies to "each sentenced offender committed to the care, custody of control of the department of corrections." The word "committed" could mean either "who has been committed," which would include existing probationers, or "who is committed," which would implicate only new

probationers. No legislative history has been submitted to this Court regarding the legislators' intent. Because both Rhode Island law and federal law clearly require that statutes not be applied retroactively unless so stated expressly, this Court finds that interpreting the statute retroactively would be unreasonable. Interestingly, the Department of Corrections' own regulations appear to indicate that the fees are to be collected from *new* probationers. The regulations provide that the first step of fee assessment is completion of the Supervision Fee form and a review of assessment with the offender. This takes place "[u]pon *intake* of an adjudicated offender placed under probation/parole supervision." Department of Corrections Regulation 10.07.03(II)(A)(1) (emphasis added).

The defendants argue that charging probation supervision fees to people who were sentenced to probation prior to July 1, 1994 is not retroactive application of the statute. They argue that retroactivity would be implicated only of probationers were charged fees for months on probation prior to that date. However, the Supreme Court has stated that "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective. . . ." *Landgraf*, 114 S.Ct. at 1499 (quoting with approval *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156)); *see also Sturges* v. *Carter*, 114 U.S. 511, 519 (1885). In the present case, the plaintiffs' sentence to probation was the past transaction, on which R.I. Gen. Laws § 42-56-38 imposes a new obligation to pay supervision fees.

Case law indicates that retroactivity occurs when new laws are applied to processes that began before the law was enacted. For example, the Supreme Court held that a new law establishing the interest rate for judgments while appeals are pending

was improperly retroactive when applied to judgments that had been awarded prior to the new law. *Kaiser Aluminum & Chem., Corp.* v. *Bonjorno*, 494 U.S. 827, 838-39 (1990). Thus, even when the interest on the judgments was still accumulating at the time of the law's passage, the key factor was when the interest accumulation began. This is parallel to the instant case, where the plaintiffs' probation period began before the law was effective but continued after its implementation. Likewise, the Rhode Island Supreme Court found that a new law establishing a different court for motor vehicle violation appeals was improperly retroactive when applied to cases where the initial violation determination was prior to the law's enactment, even though the appeals at issue were initiated after the enactment. *Walsh*, 637 A.2d at 775. In *Avanzo*, a law was passed which made general assistance recipients ineligible for benefits once they received six months of benefits within a year period. 625 A.2d at 209. The Rhode Island Supreme Court found that the law was retroactively applied because the agency counted months of benefits received prior to the law's enactment in determining recipients' ineligibility after the law's enactment. *Id.* at 211. These cases demonstrate that retroactivity includes changing the legal consequences of processes that began prior to the laws enactment. *See also Landgraf*, 114 S.Ct. at 1499. In the present case, charging supervision fees to people who were sentenced to probation prior to the statute's effective date is thus a retroactive application of the law.

Because both Rhode Island and federal courts have repeatedly disfavored retroactive application of statutes without clear evidence of the legislators' intent, this Court finds that the defendants have exceeded the statutory authority of R.I. Gen. Laws § 42-56-38 in assessing supervision fees to probationers sentenced prior to the date went into effect. For the foregoing reasons, the plaintiffs' Motion for Summary Judgment on the issue of statutory authority is granted and the defendants' Motion for Summary Judgment on this issue is denied.

VI.

PROCEDURAL DUE PROCESS

The plaintiffs also claim that the defendants, acting under R.I. Gen. Laws § 42-56-38, have violated their rights to procedural due process under the Fourteenth Amendment of the United States Constitution and under Art. 1 § 2 of the Rhode Island Constitution.[4] A governmental action which deprives an individual of a liberty or property interest requires the process of law. In this case, the Department of Corrections, a governmental body, has charged the plaintiffs a fifteen dollar offender supervision fee for each month they are on probation. The plaintiffs have a property interest in this supervision fee because they must turn over part of their monetary property to the state or else face civil suit. *See, e.g., In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603 (1st Cir. 1992) (property interest in distribution of attorneys' fees from fund); *Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985) (*en banc*) (property interest in monetary court sanction); *Walter* v. *City of Chicago*, 1992 WL 88457, *3 (N.E. Ill.) (property interest in $50 traffic ticket); *Hann* v. *Carson*, 462 F.Supp. 854, 861 (M.D. Fla. 1978) (property interest in being free from unjustified payments of charges and fees).[5]

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Supreme Court set out a balancing test for determining when procedural

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[4] As the drafters of the Rhode Island Constitution intended the Due Process Clause of the Rhode Island Constitution to parallel the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *Jones* v. *Rhode Island*, 724 F.Supp. 25, 34-35 (D.R.I. 1989), I will address these claims together.

[5] This case is clearly distinguishable from *Lee* v. *Life Insur. Co. of No. Amer.*, where imposition of a university health insurance fee was found to be a voluntary purchase of services, not a state deprivation of a property or liberty interest. 23 F.3d 14, 20-21 (1st Cir. 1994). In this case, probation is a mandatory punishment and the supervision fees are involuntary.

due process has been violated. The court must weigh "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The question in the instant case is whether the procedures involved in imposing probation supervision fees and granting waivers for financial hardship constituted due process of law for the plaintiffs. Unfortunately, the parties' Agreed Statement of Facts does not include any details of the waiver procedure, either as designed or as implemented. In order to weigh accurately the *Mathews* factors, this Court needs additional information, such as if and how probationers may submit evidence of their financial hardship, who evaluates this evidence and by what criteria, and whether probationers can request a second review if denied waives. *Goldberg* v. *Kelly*, 397 U.S. 254, 268-71 (1970); *see also Amsden* v. *Moran*, 904 F.2d 748, 753 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991) ("[T]he proper focus must be on the manner in which the state has acted: 'how and when' the alleged deprivation was effected."). The plaintiffs here claim that the Due Process Clause requires that the Department of Corrections provide individualized pre-assessment waiver determinations. In order to evaluate the necessity of additional procedures, the Court must weigh the reduction of error which these procedures would effect against the cost to the state of establishing them. *Mathews*, 424 U.S. at 346-48. However, neither party has alleged the error rate or cost associated with current or proposed procedures.

The plaintiffs also allege that due process was violated because they were never notified of the availability of waivers. *See Goldberg*, 397 U.S. at 267-68 ("[T]hese [due process] princi-

ples require that a recipient have timely and adequate notice detailing the reasons for a proposed termination. . . ."). Depending on the circumstances, due process may require notice of the right to appeal or, in this case, of the right to a waiver. *Raper* v. *Lucey*, 488 F.2d 748 (1st Cir. 1973). According to the Agreed Statement of Facts, the parties disagree as to whether the plaintiffs inquired about their obligation to pay the fee and as to what information the probation offices gave them. Clearly, the availability of information about waiver procedures is highly relevant in determining whether the Due Process Clause was satisfied in this case.

Because material issues of fact remain unclear and disputed, the plaintiff's procedural due process claim cannot be decided on summary judgment. Given the facts before the Court, both the plaintiffs' and the defendants' Motions for Summary Judgment are denied. However, since the regulation as applied to the plaintiffs is now found invalid on *ex post facto* and statutory authority grounds, the merits of the plaintiffs' procedural due process claim need not be resolved.

VII.

SUBSTANTIVE DUE PROCESS

Substantive due process focuses on the result of the governmental action, not its procedures. *Amsden*, 904 F.2d at 754. The First Circuit has stated that a violation of substantive due process occurs when state action is "egregiously unacceptable, outrageous, or conscience-shocking." *Id.* In this case, the Department of Corrections has imposed a fifteen dollar monthly supervision fee on probationers retrospectively. Regardless of the waiver procedures used, this monetary policy cannot be considered egregious or conscience-shocking. *Cf. Anyon* v. *Mach.*, 14 F.3d 44 (1st Cir. 1993) (withdrawing inmate from short-term release program did not violate substan-

tive due process violations are unsupported, and the defendants' motion for summary judgment on this claim is granted.

VIII.

CONCLUSION.

For the reasons discussed above, the plaintiffs' Motion for Summary Judgment is granted as to their *ex post facto* claim and as to their statutory authority claim. The defendants' Motion for Summary Judgment is granted as to the substantive due process claim. Both the plaintiffs' and the defendants' Motions for Summary Judgment on the procedural due process claim are denied. The defendant George Vose, Jr., is granted qualified immunity and is therefore liable only in his official capacity. Again, I clarify that the Regulation is not held unconstitutional as applied to offenders sentenced to probation after July 1, 1994.

WHEREFORE this Court declares that the implementation of Regulation 10.07.03 with regard to offenders sentenced to probation prior to the Regulation's effective date is unconstitutional as violating the *Ex Post Facto* clause and exceeds the statutory authority granted by R.I. Gen. Laws § 42-56-38.

FURTHER this Court awards reasonable attorney's fees and costs of litigation to the plaintiffs, pursuant to 42 U.S.C. § 1988(b).

/s/_____
Raymond J. Pettine
Senior U.S. District Judge

November 21, 1995

Entered as an Order of this Court November 22, 1995.

/s/_____
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM L. TAYLOR, MARY-ANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL L. BOURGET, and DAVID A. WEBB

v. C.A. No. 94-0596-P

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS, and GEORGE A. VOSE, JR., Individually and in his official capacity as Director of the Rhode Island Department of Corrections

ORDER

PETTINE, Senior Judge. The plaintiffs in the above-captioned matter have made a Motion to Make Additional Findings and Alter or Amend Judgment requesting 1) an Order requiring that the defendants reimburse offender supervision fees previously collected from the plaintiffs and awarding compensatory damages, and 2) clarification that the date of offense, not the date of sentencing, is the relevant event in applying the *Ex Post Facto* Clause. After considering these requests, this Court comes to the following conclusions.

First, this Court regards such specific relief as requested by the plaintiffs as unnecessary, in light of the fact that the plaintiffs have apparently not requested such relief from the defendants directly. My earlier ruling clearly concluded that the offender

supervision fees were unconstitutional. In light of that ruling, the plaintiffs should make a direct demand to the defendants that they reimburse the fees already paid by the tenants. Only if the defendants refuse to comply with this request should the plaintiffs find it necessary to request a specific order from this Court.

Second, this Court clarifies that the date of the offense is the relevant date for applying the *Ex Post Facto* Clause. As the Supreme Court declared in *Beazell* v. *Ohio*, 269 U.S. 167 (1925), a statute is prohibited as *ex post facto* if it "makes more burdensome the punishment for a crime, *after its commission*. . . ." *Beazell*, 269 U.S. at 169 (emphasis added). The date of the offense is therefore the basis for determining whether the punishment is retroactive and, thus, unconstitutional under the *Ex Post Facto* Clause.

SO ORDERED:

/s/_____
Raymond J. Pettine
Senior U.S. District Judge

January 10, 1996

Entered as an Order of this Court January 10, 1996.

/s/_____
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1002

WILLIAM L. TAYLOR, ET AL.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND, ET AL.,
Defendants, Appellants

Before
Torruella, *Chief Judge*
Selya, Cyr, Boudin, Stahl and Lynch, Circuit Judges
***Cummings, Circuit Judge**

ORDER OF THE COURT

Entered: January 17, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considerd by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

By_____
Chief Deputy Clerk

***Of the Seventh Circuit, sitting by designation**

[cc: Messrs. Sinapi, Palombo, Woolley and Alexander]

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1002

WILLIAM L. TAYLOR, ET AL.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: December 4, 1996

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

The parties shall bear their own costs.

By The Court

/s/_____
Clerk.

[cc: Messrs. Palombo and Sinapi]

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1002

WILLIAM L. TAYLOR, ET AL.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND, ET AL.,
Defendants, Appellants.

AMENDED JUDGMENT

Entered: December 16, 1996

On further consideration of the judgment entered on December 4, 1996,

It is ordered that the second paragraph of the judgment entered on December 4, 1996 is vacated and amended as follows: Upon consideration whereof, the district court's judgment is reversed and the cause is remanded for further proceedings on appellees' procedural due process claims under state and federal law. The remaineder of the judgment entered on December 4, 1996 shall not be affected or altered by this amended judgment.

By The Court

Clerk

[cc: Messrs. Palombo and Sinapi]

APPENDIX G

42-56-38. Assessment of costs. [Contingently effective; see Contingent Effective Date note.] — Each sentenced offender committed to the care, custody or control of the department of corrections shall reimburse the state for the cost or the reasonable portion thereof incurred by the state relating to such commitment, provided however that a person so committed, awaiting trial and not convicted, shall not be liable for the reimbursement. Items of cost shall include physical services and commodities such as food, medical, clothing and specialized housing, as well as social services such as specialized supervision and counseling. Costs shall be assessed by the director of corrections or his or her designee based upon each person's ability to pay, following a public hearing of proposed fee schedules. Each offender's family income and number of dependents shall be among the factors taken into consideration when determining ability to pay. Monies received under this section will accrue first to the department of corrections for use to offset costs of the specific care or service, and thereafter to the general fund. A separate restricted receipt account shall be established for deposit of each type of receipt. The director shall promulgate rules and regulations necessary to carry out the provisions of this section. The rules and regulations shall provide that the financial situation of persons, financially dependent on the person, be considered prior to the determination of the amount of reimbursement. This section shall not be effective until the date the rules and regulations are filed with the office of the secretary of state.

History of Section.

P.L. 1992, c. 133, art. 97, § 2.

Contingent Effective Dates. As of the date of publication of the 1993 Reenactment, the rules and regulations referred to in the last sentence had not been filed with the office of the secretary of state.

RHODE ISLAND
DEPARTMENT OF
CORRECTIONS

POLICY AND PROCEDURE

NUMBER 10.07.03

EFFECTIVE DATE:
July 1, 1994

SECTION:
ADULT PROBATION AND
PAROLE OFFENDER
SUPERVISION FEES

AUTHORITY:
Rhode Island General Laws ("RIGL") section 42-56-10(v), Powers of the Director and section 42-56-38 Assessment of Costs.

I. POLICY

It is the policy of the Rhode Island Department of Corrections (RIDOC) to assess and collect fees from offenders who are placed under the supervision of probation pursuant to conviction in the District and Superior Courts of Rhode Island or paroled by Rhode Island Parole Board.

The fees described herein are a monthly assessment for the duration of the period of probation/parole supervision for the purposes of service provision.

The Director of Department of Corrections, following conduct of a public hearing, will issue a schedule of fees to be assessed offenders on probation or parole.

II. PROCEDURE

A. Fee Assessment

1. Upon intake of an adjudicated offender placed under probation/parole supervision, the assigned

probation/parole staff will complete a Supervision Fee form, review with the offender that the fee assessment is in accordance with RIGL, and review the amount of the assessment.

2. The supervision fee shall be paid throughout the period of supervised probation/parole.

3. A payment schedule is established, and the method of payment is carefully reviewed with the offender.

4. It shall be the responsibility of the offender to make known and demonstrate to the full probation/parole staff any inability to pay the full monthly fee. Potential causes for waiver must be in accordance with established criteria in Section E.

B. Payment of fees

1. The completed Supervision Fee form is to be forwarded by probation/parole staff to the agency contracted by Department of Corrections ("contract agency"). One copy is to be given to the offender and one copy placed in the probation/parole record.

2. The offender is to pay the fee directly to the contract agency as indicated on the payment schedule.

3. It shall be the responsibility of the contract agency to collect, record, and report all offender fee payments, in accordance with terms estlablished.

C. Reporting Responsibilities

1. The contract agency shall provide regular notification to the department regarding enrolled offenders, payments made, and payments due.

2. The contract agency shall forward such payments as are due to the department on a regular basis, with full accounting and itemization, as provided in the contract between RIDOC and the agency.

3. It shall be the responsibility of the probation/parole staff to notify the offender and the contract agency if there is a change in offender status such that the offender is no longer subject to the monthly assessment. Such changes include transfer to banked status, case closing, approved move out of state, or other change to unsupervised status.

4. It shall be the responsibility of the probation/parole staff to notify the contract agency if any temporary or permanent waiver of fees is granted for cause after the Supervision Fee form and payment schedule have been registered with the contract agency.

5. It shall be the responsibility of the offender to notify both probation/parole and the contract agency of any change of address.

D. Non-compliance

1. In the event an offender does not maintain the schedule of payments, and has not applied for or been granted a waiver, probation/parole shall reinforce with the offender the importance of making regular payments.

2. The offender shall be reminded as necessary of the lawful obligation to pay all assessed fees, and shall be made aware that the contract agency can legally pursue payment owed, even beyond the term of probation/parole.

3. The offender's probation or parole shall not be violated solely for non-payment of offender fees. However, in the event of other violations of the conditions of probation/parole, non-payment of offender fees may be brought to the attention of the court, formally or informally, as indicative of a lack of cooperation, failure to fulfill lawful obligations, or other pattern of non-compliance.

E. Offender Fee Waiver Criteria

1. There is a presumption that supervised offenders have the ability and the obligation to pay the full monthly assessment *unless and until* the offender demonstrates otherwise to probation/parole staff.

2. Supervisory consultation and approval are required for any grant of temporary or permanent waiver of some or all of the monthly assessment.

3. Criteria to be considered include evidence of one or more of the following situations, a review of the offender's total family income, along with evidence of undue hardship caused by payment of full offender fees:

   a. Recovery from an accident or significant illness.

b. Lack of employment while also actively seeking work or receiving state income assistance.
c. Physical or mental disability which precludes earning sufficient income.
d. Temporary financial difficulty or crisis due to extraordinary circumstances.
e. Responsibility for support of dependents which could be jeopardized by payment of offender fees.
f. Full time student status in recognized academic or vocational training program.
g. Retired and on limited fixed income.
h. Participation in inpatient treatment program.
i. Pre-trial incarceration.
j. Other extenuating circumstances, as determined by probation/parole staff and supervisor.

RHODE ISLAND DEPARTMENT OF CORRECTIONS
ADULT PROBATION AND PAROLE

OFFENDER FEE SCHEDULE

(Public Hearing on Fee Schedule held on May 4, 1994)

Monthly Payment – $15.00

APPROVED: _____

George A. Vose, Jr.
Director

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM L. TAYLOR, MARY-ANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL L. BOURGET, and DAVID A. WEBB

v. C.A. No. 94-0596-P

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS, and GEORGE A. VOSE, JR., Individually and in his official capacity as Director of the Rhode Island Department of Corrections

AGREED STATEMENT OF FACTS

Now come the parties in the above-cited matter pursuant to this Court's order dated July 3, 1995, and do hereby submit the following Agreed Statement of Facts on the basis of which the parties submit this case for consideration and decision by the Court:

1. Plaintiff William L. Taylor ("Taylor") is a resident of the Town of Coventry, County of Kent, State of Rhode Island. Plaintiff Taylor was placed on probation from on or about March 9, 1994 through March 8, 1995 as a result of convictions on or about November and December of 1993 for misdemeanor offenses committed in July and November of 1993.

2. Plaintiff Maryanne Silva ("Silva") is a resident of the Town of Coventry, County of Kent, State of Rhode Island.

Plaintiff Silva was placed on probation from on or about April 7, 1994 through April 6, 1996 as a result of a felony committed on or about November 10, 1993.

3. Plaintiff Raymond W. Christiansen ("Christiansen") is a resident of the City of Warwick, County of Kent, State of Rhode Island. Plaintiff Christiansen was placed on probation from on or about October, 1983 to January 22, 1999 as a result of a conviction on or about October, 1983 for several felonies committed in April of 1983.

4. Plaintiff Lionel L. Bourget ("Bourget") is a resident of the City of Woonsocket, County of Providence, State of Rhode Island. Plaintiff Bourget was placed on probation from on or about May 23, 1994 through May 23, 1995 as a result of a conviction on or about June 20, 1994 for a misdemeanor committed in August, 1992.

5. Plaintiff David A. Webb ("Webb") is a resident of the City of Providence, County of Providence, State of Rhode Island. Plaintiff Webb was placed on probation from on or about May, 1993 through May, 2013 as a result of a conviction on or about sometime in 1978 for a felony committed in December, 1977.

6. Defendant State of Rhode Island ("State") is sued on the basis of official acts and/or omissions committed by employees and agents of the Department of Corrections ("DOC"), a department created pursuant to R.I.G.L. § 42-56-1, *et seq.*, within the executive department of the State of Rhode Island, which said State is a sovereign state of the United States.

7. Defendant George A. Vose, Jr. ("Vose") is the Director of the DOC and is sued in his individual and official capacities. Defendant Vose is responsible for promulgating and implementing DOC policies and procedures, including but not limited to those relating to the imposition and assessment of the adult probation and parole offender supervision fees at issue herein. As Director of the DOC, Defendant Vose's acts per-

formed in said capacity may fairly be said to represent official policy of the DOC.

8. That Rhode Island General Law § 42-56-38, as enacted by P.L. 1992, ch. 133, art. 97, sec. 2, provides that each sentenced criminal offender committed to the care, custody or control of the DOC, including but not limited to those on probation or parole, are required to reimburse the State for the cost, or a reasonable portion thereof, incurred by the State relating to such commitment. A true and accurate copy of § 42-56-38 is attached hereto and incorporated herein by reference as Exhibit A.

9. That § 42-56-38 specifically provides that it shall not be effective until the date rules and regulations implementing its provisions are filed with the office of the Secretary of State.

10. Effective March 22, 1993, the DOC promulgated Regulation No. 1.12.01 for the purpose of promulgating rules and regulations necessary to carry out the provisions of Rhode Island General Laws § 42-56-38 mandating the assessment of, *inter alia*, offender supervision fees. A true and accurate copy of Regulation No. 1.12.01 is attached hereto as Exhibit F.

11. After the proposed regulations and fee schedules were promulgated as a result of Regulation No. 1.12.01 discussed above, a public hearing was held on June 28, 1993 on proposed offender fee schedules relative to programs *other* than the adult probation and parole program services at issue in this case. A true and accurate copy of said schedules are attached hereto as Exhibit C (furlough, work release, and interstate compact probation and parole programs).[1]

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[1] For purposes of the parties' cross-motions for summary judgment, based on the Defendants' representations that the information contained therein is true and accurate, Plaintiffs do not dispute the facts alleged in this paragraph of the text; however, Plaintiffs assert that the facts alleged therein are neither relevant nor material to an adjudication of the Complaint in this case. Defendants assert that the facts alleged herein are relevant and material to adjudicate this matter.

12. Defendant Vose thereafter established and appointed an offender supervision fee subcommittee composed of DOC managers who were assigned the task of drafting the rules and regulations and proposed fee schedule to implement the imposition of offender supervision fees at issue in this case with respect to adult probation and parole programs in accordance with R.I.G.L. § 42-56-38.[2]

13. That on May 4, 1994, a public hearing was held on the adult probation and parole offender supervision fees of $15.00 per month proposed by the DOC to implement, in part, the provisions of § 42-56-38. At the foregoing public hearing, public comments were requested and none were received regarding the proposed regulations. In attendance at the public hearing was ACLU representative, Christopher Corbett.[1]

14. That on June 17, 1994, the Defendants filed rules and regulations with the Rhode Island Secretary of State implementing § 42-56-38 entitled "Adult Probation and Parole Offender Supervision Fees," effective as of July 1, 1994, providing for the imposition of sentenced offender supervision fees, also designated as Regulation No. 10.07.03 ("Regulations"). That a true and accurate copy of the Regulations is attached hereto and incorporated herein by reference as Exhibit B.

15. That on or about June 16, 1994, Defendant Vose sent a letter addressed to all individuals who were on supervised probation or parole dn Rhode Island, notifying said individuals that as of July 1, 1994, a $15.00 per month sentenced offender supervision fee would be imposed pursuant to § 42-56-38. A true and accurate copy of said letter is attached hereto and incorporated herein by reference as Exhibit C.

16. That only Plaintiff Webb expressly recalls receiving the foregoing notice letter from Defendant Vose. The first notice

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[2] *See* footnote 1.

[1] *See* footnote 1.

of imposition of the sentenced offender supervision fees at issue expressly recalled by the remainder of the Plaintiffs is receipt of a montly offender fee invoice from the DOC sometime subsequent to July 1, 1994, a true and accurate copy of the form of which is attached hereto and incorporated herein by reference to Exhibit D.

17. That, in addition, the DOC has continued to send follow up monthly bills to the Plaintiffs and has or will send monthly follow up bills to those Plaintiffs delinquent in payment of the subject sentenced offender supervision fees containing the words "FINAL NOTICE" and advising that a civil action would follow if the fees were not paid in full. A true and accurate copy of said monthly bill directed to delinquent individuals is attached hereto and incorporated herein by reference as Exhibit E.

18. That upon receiving notice from the Defendants of the imposition of offender supervision fees, each of the Plaintiffs assert that he or she contacted his or her probation officer and/or probation office inquiring about their respective obligation to pay the fee and they were not told of any right or procedure by which to seek an appeal or waiver from imposition of the offender supervision fees nor were they offered or provided with a copy of the Regulations or a summary thereof. Defendants assert that none of the Plaintiffs requested a waiver of the offender supervision fees imposed by the Regulations as provided therein.[4]

19. According to figures compiled by the DOC, as of on or about July, 1995, there were approximately 12,412 active probation and parole files with respect to individuals who were subject to the imposition of offender supervision fee pursuant to

[4] The parties were unable to agree on precisely what occurred as to each Plaintiff when the Plaintiffs contacted their respective probation officer or office upon notice of the imposition of the offender supervision fees. Accordingly, the parties have agreed upon this compromise language.

the Regulations, of which approximately 2,547 or almost 20% were granted waivers due to financial hardship. Of the waivers granted, 1,395 were granted retroactively.[5] That true and accurate copies of the preprinted waiver forms provided for use by probation officers as part of the waiver procedure are attached hereto as Exhibit H.

20. That as of July 1, 1994, each of the Plaintiffs was being supervised under probation by a member of the DOC probation staff.

21. That the offenses which form the basis of the Plaintiffs commitment to the DOC on probation were committed prior to July 1, 1994.

22. That the Plaintiffs were assessed offender supervision fees after having been placed on probation.

23. That neither at the time the Plaintiffs' underlying offenses were committed, nor at the time the Plaintiffs were placed on probation, were offender supervision fees imposed by law as a requirement or condition of such probation or otherwise.

24. At the time offender supervision fees were imposed on Plaintiff Taylor, he was employed at Video World, 1670 Warwick Avenue, Warwick, Rhode Island, which was a family business that they were trying to build up. He earned around $75.00 per week "expense money" while they were attempting to build up their business. Also, from the end of 1990 through 1993, Plaintiff Taylor was employed as the manager of Taylor's Tavern, 178 Washington Street, West Warwick, Rhode Island, earning approximately $200.00 per week. Plaintiff Taylor believes he has paid all offender supervision fees imposed upon him since July 1, 1994 through on or about May 15, 1995.[6]

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[5] *See* footnote 1.

[6] For purposes of the parties' cross-motions for summary judgment, Plaintiffs do not dispute the facts alleged in ¶¶ 24-28 of the text, however, Plaintiffs assert that the facts alleged therein are neither relevant nor material to an adjudication of the

25. At the time offender supervision fees were imposed on Plaintiff Silva, she was employed at Video World, 1670 Warwick Avenue, Warwick, Rhode Island, which was her boyfriend's family business. She earned around $75.00 per week "expense money" while they were attempting to build up the business. Also, subsequent to January 1990 through on or about January 1994, Plaintiff Silva was employed at Fairway Displays, 1050 Toll Gate Road, Warwick, Rhode Island, earning approximately $170.00 per week. Plaintiff Silva believes she has paid all offender supervision fees imposed upon her since July 1, 1994 through on or about May 15, 1995.

26. At the time offender supervision fees were imposed on Plaintiff Christiansen, he was employed as a laborer with Local 271, Providence, Rhode Island as a result of which he claims to have earned approximately $6,000.00 over a one-year period since being placed on probation. Plaintiff Christiansen has paid no offender supervision fees through April 21, 1995.

27. At the time offender supervision fees were imposed on Plaintiff Bourget, he was employed at Giovanni Jewelry earning $360.00 weekly for a period of approximately 3 years. He subsequently became unemployed in September 1994 and collected unemployment benefits in the amount of $330.00 per week. Plaintiff Bourget has made only 2 payments of monthly offender supervision fees totalling $30.00 as of April 1, 1995.

28. At the time offender supervision fees were imposed on Plaintiff Webb, he was collecting and continues to collect workers' compensation benefits in the amount of $254.94 per week. Plaintiff Webb has not paid any monthly offender supervision fees as of April 17, 1995.

Complaint in this case. Defendants assert that the facts alleged herein are relevant and material to adjudicate this matter.

Plaintiffs
By Their Attorneys,

Richard A. Sinapi, Esquire
AMERICAN CIVIL LIBERTIES UNION
RHODE ISLAND AFFILIATE
SINAPI LAW ASSOCIATES, LTD.
100 Midway Place, Suite 1
Cranston, R.I. 02920-2977
(401) 944-9690
R.I. Bar No. 2977

Defendants
By Their Attorneys,

Thomas A. Palombo
Special Asst. Attorney General
72 Pine Street
Providence, RI 02903
(401) 274-4400 ext. 2296
R.I. Bar No. 4212

Ellen Evans Alexander
Deputy Chief Legal Counsel
Department of Corrections
45 Howard Avenue
Cranston, RI 02920
(401) 000-0000
R.I. Bar No. 3882

EXHIBIT A

[Omitted – reproduced elsewhere]

EXHIBIT B

[Omitted – reproduced elsewhere]

EXHIBIT C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Corrections
ADULT PROBATION AND PAROLE
J. Joseph Garrahy Judicial Complex
One Dorrance Plaza
Providence, R.I. 02903

June 16, 1994

To Whom It May Concern:

As of July 1, 1994, all individuals who are being supervised in Rhode Island on Probation or on Parole are required to pay a supervision fee. The fee of $15.00 per month must be paid for each month of supervised Probation or Parole.

All fees will be collected by a private company, Municipal Collection Agency, Inc., which is under contract with the Rhode Island Department of Corrections for this purpose. Checks or money orders should be made payable to MCA, and sent to MCA, 100 Fountain Street, Providence, RI 02901. You will receive a monthly bill, a sample of which is enclosed.

Failure to pay all fees or falling behind on payments could result in civil legal action against you, even after your probation or parole has terminated.

You are legally obligated to pay these fees which have been instituted under the authority of Rhode Island General Laws

section 42-56-10(v), Powers of the Director, and section 42-56-38, Assessment of Costs. The amount of the fee and the general collection process were established following a public hearing on May 4, 1994.

All fees received by the Rhode Island Department of Corrections will be used to help support the operations of Adult Probation and Parole.

Sincerely,

_____

George A. Vose, Jr.
Director

wp:ppfees/cb2/94

EXHIBIT D

R.I. DEPARTMENT OF CORRECTIONS
PROBATION/PAROLE

Municipal Collection Agency, Inc.
P.O. Box 84
Providence, RI 02901
Telephone # (401) 521-2275

Ms. Mary Ann Silva
152 Pawtuxet Terrace
West Warwick, R.I. 02893

Account Number: 584214037
Counselor Number: 131

Due Date 10/31/94
Month of August
Amount Due $15.00
Past Due Amount $15.00
Total Amount Due $30.00

FAILURE TO PAY THE TOTAL AMOUNT DUE BY THE DUE DATE WILL RESULT IN CIVIL LEGAL ACTION IN ACCORDANCE WITH RHODE ISLAND LAW AND DEPARTMENT OF CORRECTIONS POLICY.

Use enclosed envelope and return bottom portion with check or money order made payable to MCA. Do not send cash.

EXHIBIT E

R.I. DEPARTMENT OF CORRECTIONS
PROBATION/PAROLE

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STATES WHICH HAVE ENACTED OFFENDER FEE STATUTES

Ala. Code § 15-22-56(b) (1996) (probation/parole supervision fee not to exceed 25% of gross income; enacted 1989); Ariz. Rev. Stat. Ann. § 31-466A (1996) ($30.00 per month probation/parole supervision fee; enacted 1996); Ark. Code Ann. § 16-93-104(a)(1) (Michie 1995) (probation/parole supervision fee); Cal. Penal Code § 1208.2(f) (West 1997) (probation/parole supervision fee; enacted 1991); Colo Rev. Stat. Ann. § 16-11-204(2)(a)(V) (West 1996) (probation supervision fee of $50.00 plus $5.00 per month for misdemeanor and $20.00-$35.00 per month for felony; enacted 1995); Conn. Gen. Stat. Ann. § 53a-29(d) (West 1996) ($200.00 probation supervision flat fee; enacted 1989); Del. Code Ann. tit. 11, § 6504(14) (1996) ($10.00-$25.00 per month probation/parole supervision fee depending on accountability level); Fla. Stat. Ann. § 948.09(1)(a)(b) (West 1997) (probation/parole supervision fee of not less than $40.00 per month for misdemeanor and not to exceed per diem cost of supervision for felony; enacted 1996); Ga. Code Ann. § 42-9-42(d)(2) (1997) (parole supervision fee of not less than $10.00 per month); Idaho code § 20-225 (1996) ($35.00 per month probation/parole supervision fee; enacted 1984); Ill. Ann. Stat. ch. 730 § 5/5-6-3(i) (Smith-Hurd 1996) ($25.00 per month probation supervision fee; enacted 1989); Kan. Crim. Code Ann. § 21-4610a(a) (Vernon 1995) (probation service fee of $25.00 per month for misdemeanor and $50.00 per month for felony); Ky. Rev. Stat. Ann. § 439.315(2) (Michie/Bobbs-Merrill 1996) (probation/parole supervision fee of not less than $10.00 per month and not to exceed $500.00 for misdemeanor and not less than $10.00 per month and not to exceed $2500.00 for felony); La. Code Crim. Proc. Ann. art. 895.1c (West 1996) (probation supervision fee of not less than $20.00 per month and not to

exceed $100.00 per month; enacted 1984); Me. Rev. Stat. Ann. tit. 17A § 1204 1-A (West 1996) (probation supervision fee between $10.00-$50.00 per month as determined by court); Md. Code Ann. Gov.-Exec. & Admin. Depts. 41-§4-519(b) (1996) ($40.00 per month probation/parole supervision fee; enacted 1991); Mass. Gen. Laws Ann. ch. 276 § 87A (West 1996) ($45.00 per month probation supervision fee); Mich Comp. Laws Ann. § 771.3c (West 1996) (probation supervision fee not to exceed $30.00 per month; enacted 1989); Minn. Stat. Ann. § 244.18 (West 1996) (probation/parole supervision fee); Miss. Code Ann. § 47-5-1013(b) (1996) (probation supervision fee not to exceed $50.00 per month; enacted 1993); Mo. Ann. Stat. § 549.525(1) (Vernon 1996) ($10.00 per month probation supervision fee); Mont. Code Ann. § 46-23-1031(1)(a) (1995) ($10.00 per month probation/parole supervision fee; enacted 1993); Nev. Rev. Stat. Ann. 213.1076 1(b) (Michie 1995) (probation/parole supervision fee of not less than $12.00 per month; enacted 1993); N.H. Rev. Stat. Ann. § 504-A:13 (1995) (probation/parole supervision fee of not less than $40.00 per month; enacted 1996); N.J. Stat. Ann. § 2C:45-1(d) (West 1997) ($25.00 per month probation service fee); N.Y. Exec. Law § 259-a(9) (McKinney 1996) ($30.00 per month parole supervision fee; enacted 1997); N.C. Gen. Stat. § 15A-1374(c) (1996) ($20.00 per month parole supervision fee); N.D. Cent. Code § 12.1-32-07 2 (1995) (probation supervision fee of not less than $30.00 per month; enacted 1993); Ohio Rev. Code Ann. § 2951.021 (B)(2) (Baldwin 1996) (probation/parole supervision fee of not less than $50.00 per month); Okla. Stat. Ann. tit. 22 § 991d B (West 1997) ($40.00 per month probation/parole supervision fee); Or. Rev. Stat. § 423.570(1) (1995) (probation/parole supervision fee of not less than $25.00 per month; enacted 1997); Pa. Stat. Ann. tit. 71 § 180-7.20(a) (1996) (probation/parole supervision fee of not less than $25.00 per month enacted 1991); R.I. Gen. Laws § 42-56-38 (1996)

($15.00 per month probation/parole supervision fee; enacted 1994); S.C. Code Ann. § 24-21-80 (Law. Co-op. 1996) (probation/parole supervision fee of not less than $20.00 per month and not to exceed $100.00 per month); Tenn. Code Ann. § 40-28-201(a)(1) (1996) ($15.00 per month probation/parole supervision fee; enacted 1995); Tex. Code Crim. Pro. Ann. art 42.18 § 1(j) (West 1997) ($10.00 per month parole supervision fee; enacted 1993); Utah Code Ann. § 64-13-21 (1996) ($30.00 per month probation/parole supervision fee; enacted 1993); VT. Stat. Ann. tit. 28 § 102 (c)(14) (1995) ($30.00 per month probation/parole supervision fee; enacted 1996); Va. Code Ann. § 53.1-150A (Michie 1996) ($200.00 probation/parole supervision flat fee; enacted 1995); Wash. Rev. Code Ann. § 10.64.120(1) (West 1996) ($100.00 misdemeanor probation supervision flat fee); W.Va. Code § 62-12-17(5) (1996) (probation/parole supervision fee not to exceed $20.00 per month; enacted 1994); Vis. Stat. Ann. § 304.074(2) (West 1996) (probation/parole fee of not less than $1.00 per day; enacted 1996).

Supreme Court, U.S.
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No. 96-1670

In The

Supreme Court of the United States

October Term, 1996

WILLIAM L. TAYLOR, MARYANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL BOURGET and DAVID A. WEBB,

Petitioners,

v.

STATE OF RHODE ISLAND, DEPARTMENT OF CORRECTIONS and GEORGE A. VOSE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Ceriorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY B. PINE
Attorney General
THOMAS A. PALOMBO*
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400 Ext. 2296

ELLEN EVANS ALEXANDER
Deputy Chief Legal Counsel
Department of Corrections
40 Howard Avenue
Cranston, RI 02920
(401) 464-2622

Attorneys for Respondent State of Rhode Island

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari although the First Circuit's opinion does not conflict with any decision of this Court, or of any other circuit.

2. Whether the $15.00 offender fee, which is applied each month to a diminishing number of probationers and parolees for services rendered during that month, with its liberal waiver provisions, is a violation of the *Ex Post Facto* Clause.

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OPINION BELOW

Taylor v. State of Rhode Island, 101 F.3d 780 (1st Cir. 1996)

STATUTES

U.S. Const. Art. I, § 10

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R.I. Gen. Laws § 42-56-38

Regulation 10.07.03, Rhode Island Department of Corrections

STATEMENT OF THE CASE

In 1992, the General Assembly of Rhode Island directed that "[e]ach sentenced offender committed to the care, custody and control of the department of corrections shall reimburse the state for the cost or the reasonable portion thereof incurred by the state relating to such commitment . . . ." R.I. Gen. Laws § 42-56-38 – Assessment of Costs, P.L. 1992, c. 333, art. 97, § 2 (the "offender fee" statute). Petitioners' Appendix at 44A.[1] Among the items of cost assessed under the statute are "social services such as specialized supervision and counseling" that are provided prospectively to offenders on probation and parole. *Id.*

[1] References to Petitioners' Appendix are hereinafter designated as "Pet.App.".

The offender fee statute became effective on March 22, 1993, when its general implementing regulation was filed with the Secretary of State. A public hearing was then held on the proposed $15.00 monthly offender supervision fee on May 14, 1994. Each offender on supervised probation or parole was notified of the $15.00 per month fee by a letter dated June 16, 1994 from George A. Vose, Jr., Director of the Department of Corrections. Pet.App. 61A-62A. By regulation filed with the Secretary of State on June 17, 1994, this fee became effective on July 1, 1994. Pet.App. 45A-50A. As of that date, all probationers and parolees actively receiving specialized supervision and counseling, who did not obtain financial hardship waivers, became responsible for the $15.00 monthly fee.

In November 1994, Petitioners brought a civil action in the United States District Court for the District of Rhode Island. They alleged that the regulation imposing the $15.00 monthly fee was unconstitutional and in excess of statutory authority. Petitioners complained that the fee was unconstitutional as applied to offenders, such as they, who committed their crimes prior to July 1, 1994.

Specifically, Petitioners alleged that the regulation violated the prohibition against *ex post facto* laws found in Article I, § 10 of the United States Constitution and Article I, § 12 of the Rhode Island Constitution. They further complained the regulation deprived them of their rights to equal protection and their substantive and procedural due process rights under both the United States and Rhode Island Constitutions. Finally, Petitioners claimed that the regulation exceeded the statutory

authority granted the Department of Corrections by the General Assembly in R.I. Gen. Laws § 42-56-38.

The matter was submitted to the district court on cross motions for summary judgment, supported by an agreed statement of facts. Pet.App. 51A-58A. Petitioners' motion was granted as to *ex post facto* and that the Department of Corrections exceeded its statutory authority. Pet.App. 11A-37A.[2] Respondent George A. Vose, Jr. was dismissed on the basis of qualified immunity and Respondents were granted summary judgment on the substantive due process issue. The court did not reach the procedural due process issue. The court issued a second opinion clarifying the effective date for imposing the fees. Pet.App. 38A-39A. Judgment entered on January 16, 1996.

On December 4, 1996, the Court of Appeals for the First Circuit reversed. *Taylor v. State of Rhode Island*, 101 F.3d 780 (1st Cir. 1996). Pet.App. 1A-10A. In upholding the $15.00 monthly fee, the First Circuit reasoned that the legislature imposed a modest, civil charge which is entirely remedial and that its practical effect is neither retributive nor deterrent in nature. Pet.App. 7A-10A. The First Circuit remanded for further proceedings on Petitioners' procedural due process claims under federal and state law.

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[2] The district court's decision is reported at 908 F. Supp. 92 (D.R.I. 1995).

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for a writ of certiorari, as the First Circuit's decision does not conflict with any decision of this Court or with any decision of any other circuit. The touchstone of the *ex post facto* analysis is whether the challenged state action is punishment; if not, the inquiry ends. The Petition should be denied as the offender fee is not punishment and the *Ex Post Facto* Clause does not apply.

ARGUMENT

I. THE FIRST CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

A. This Court's Recent Decision In *Lynce v. Mathis* Is Entirely Consistent With The First Circuit's Ruling.

1. The Facts In *Lynce* Are Inapposite To The Underlying Facts In This Case.

This Court's recent decision in *Lynce v. Mathis*, 117 S.Ct. 891 (1997), involved a statutory change which retroactively canceled provisional release credits awarded to inmates. In 1986, petitioner received a 22-year prison sentence for attempted murder. He was released from prison in 1992 after earning early release credits totaling 5,668 days, including 1,860 days of "provisional credits" awarded as a result of prison overcrowding. Thereafter, the state attorney general issued an opinion canceling all provisional credits retroactively awarded to prisoners

convicted of murder or attempted murder. Petitioner was arrested and returned to prison. 117 S.Ct. at 893.

This petition involves R.I. Gen. Laws § 42-56-38, which directs sentenced offenders to reimburse the state for, *inter alia*, the cost of social services such as specialized supervision and counseling. The offender fee statute, which authorizes the Department of Corrections to assess a fee to reimburse the state for costs, bears no resemblance to the plight of the petitioner in *Lynce*, who had previously received over five (5) years of gain time, was released from prison after the statutory change, and was then rearrested and reimprisoned.

2. The Finding That The Offender Fee Is Not Punishment Is Consistent With The Holding In *Lynce*.

The "narrow issue" in *Lynce* was whether the amendments disadvantaged petitioner by increasing his punishment. *Id.* at 896. The *Ex Post Facto* Clause prohibits legislatures from enacting statutes, such as the amendment in *Lynce*, which retroactively cancelled gain time actually awarded to prisoners. In other words, while the *Ex Post Facto* Clause prohibits a statutory amendment which retroactively increases punishment for criminal acts, the clause does not apply to the civil prospective $15.00 monthly assessment. *See Martel v. Fridovich*, 14 F.3d 1, 3 (1st Cir. 1993) (the *Ex Post Facto* Clause does not apply to revised rules which are not punitive).

In *Lynce*, this Court reviewed the major Supreme Court *ex post facto* cases and clarified that the appropriate focus is whether the statutory change increased the

"quantum of punishment". 117 S.Ct. at 897.[3] The Court focused on the decision in *Morales, supra,* that *ex post facto* protections do not apply when the frequency of parole hearings were decreased for certain offenders, because there was no reason to conclude that a prisoner would spend more time in prison. *Id.* at 897.[4] As the offender fee is a civil charge, rather than punishment, the *ex post facto* protections do not apply. *Id.* at 896.

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[3] *Weaver v. Graham,* 450 U.S. 24 (1981) (statutory amendment that retroactively reduced the amount of gain time credits available to prisoners, in effect eliminating the lower end of the possible range of prison terms, violated the *Ex Post Facto* Clause); *Miller v. Florida,* 482 U.S. 423 (1987) (statutory change was an *ex post facto* law because prisoner's presumptive sentencing range increased); *Lindsey v. Washington,* 301 U.S. 397 (1937) (new statute requiring petitioners to be sentenced to a maximum term of imprisonment violated *ex post facto* proscription). Conversely, where punishment is not increased, the *Ex Post Facto* Clause is not implicated. Thus, *Collins v. Youngblood,* 497 U.S. 37 (1990), held that a new Texas statute allowing reformation of an improper jury verdict assessing unauthorized punishment to a person previously convicted was not an *ex post facto* law. In addition, *California Department of Corrections v. Morales,* 514 U.S. 499 (1995), reasoned that amending the law governing parole suitability hearings, to defer subsequent parole hearings for up to three years, did not violate the *Ex Post Facto* Clause.

[4] The First Circuit noted that the teachings of *Morales* applied to the offender fee, stating "that courts must determine whether a legislative change 'produces a sufficient risk of increasing the measure of punishment' . . . [and] [a] legislative change which creates only a 'speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment' is insufficient to raise the *ex post facto* specter." 101 F.3d at 784, n. 9, Pet.App. at 10A.

B. The First Circuit's Opinion Does Not Conflict With The Fifth Circuit's Decision In *Sheppard*.

Petitioners disingenuously claim that *Sheppard v. Louisiana Board of Parole*, 873 F.2d 761 (5th Cir. 1989), conflicts with the decision by the First Circuit.[5] In fact, the Fifth Circuit remanded *Sheppard* and the appended *Murray* without any opinion on the merits. *Id.* at 762, 764-65. Ultimately, *Sheppard* was dismissed without prejudice by the district court. *Sheppard v. Louisiana Board of Parole*, C.A. No. 88-0639 (M.D. La. 1990).[6] *Murray* concluded with a district court decision that Louisiana's parole supervision fee was not an *ex post facto* law, because it was not punishment and did not flow from the commission of a crime and was, instead, an administrative fee for the purpose of defraying the cost of parole supervision. *Murray v. Phelps*, C.A. No. 88-0129-A (M.D. La. 1993). This is the identical conclusion reached by the First Circuit; that Rhode Island's modest, cost-based supervisory fee is remedial and not punitive. *Taylor*, 101 F.3d at 783-84, Pet.App. 8A.[7]

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[5] *Sheppard* appended *Murray v. Phelps*, No. 88-3302 (5th Cir. Feb. 3, 1989) 867 F.2d 1426 (table) (unpublished). The cases are factually similar and both were remanded to the district court for further proceedings.

[6] Since the *Sheppard* and *Murray* district court decisions are unreported, Respondents submitted an Appendix in the district court of Rhode Island containing a certified copy of the docket and order in *Sheppard* and a certified copy of the docket and the court's opinion and judgment in *Murray*.

[7] Noteworthy is the fact that the First Circuit neither cited nor discussed *Sheppard* and *Murray*, although both parties cited the cases.

Moreover, in both *Sheppard* and *Murray*, parole was either revoked or subject to revocation for nonpayment of the parole fee. Such is simply not the case here. The appellate court noted, "[a]s the district court recognized, any possible link between nonpayment of the offender fee and the revocation of parole/probation is too attenuated to render the offender fee violative of the *Ex Post Facto* Clause, *Taylor*, 908 F.Supp. at 101, especially since *inability to pay* constitutes grounds for waiver." 101 F.3d at 784, n. 9.[8] Thus, given the outcome of both *Sheppard* and *Murray*, there is no basis for Petitioners to pretend a conflict exists between circuits.

C. Petitioner Misconstrues The Recent Holding In *Ursery*.

The majority in *United States v. Ursery*, 116 S.Ct. 2135 (1996), held that civil forfeitures do not constitute "punishment" for the purposes of the Double Jeopardy Clause. The *Ursery* Court analyzed a line of "punishment" cases including *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 509 U.S. 602 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), to address the lower court's finding that these cases had disturbed a long line of cases holding that *in rem* civil forfeitures are not punishment.

Petitioners misconstrue the majority discussion in *Ursery*, which simply distinguishes civil forfeiture from civil fines. They erroneously conclude that this Court specifically held that *Halper's* definitional framework is

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[8] *See* discussion of *Morales*, *supra* at n. 4.

irrelevant for defining punishment. Petitioners employ statements by the *Ursery* majority such as "[i]n *Halper*, we emphasized that our decision was limited to the context of civil penalties", 116 S.Ct. at 2144 or that *Halper* emphasizes "the case-specific nature of our inquiry," 116 S.Ct. at 2143, to argue that *Halper* only applies to double jeopardy and can never be used in an *ex post facto* case.

After neglecting to mention that the *Ursery* language simply distinguishes an *in rem* case from a penalty case, Petitioners compound this error by declaring that the First Circuit improperly used the *Halper* test to determine whether the offender fee is penal or remedial. *See Ursery*, 116 S.Ct. at 2142-43. It is axiomatic that an initial inquiry be made as to whether a statutory amendment constitutes punishment *before* utilizing the objective test in *Lynce* to assess the quantum of punishment. *See Lynce*, 117 S.Ct. at 897.

Despite Petitioners' protests, the First Circuit's use of *Halper* to determine whether the statutory change constitutes punishment, *before* entering the myriad of other *ex post facto* considerations, is consistent with the practice of other circuits. *See Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235 (3rd Cir. 1996); *DiCola v. Food and Drug Administration*, 77 F.3d 504 (D.C. Cir. 1996); *Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1989) (noting that *Halper* applies because the threshold question under the *Ex Post Facto* and Double Jeopardy Clauses is whether the statutory change constitutes punishment).[9] Accordingly, the

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[9] The Double Jeopardy Clause serves the function of preventing "successive punishments and . . . successive

First Circuit in this case, as well as in *United States v. Stoller*, 78 F.3d 710 (1st Cir. 1996), *cert. dismissed* 117 S.Ct. 378 (1996), properly used the *Halper* touchstone to determine whether a statutory amendment is punishment. Finding no punishment, the inquiry properly ended.

II. THE FIRST CIRCUIT CORRECTLY HELD THAT THE MODEST $15.00 MONTHLY FEE, ASSESSED PROSPECTIVELY TO ONLY THOSE PROBATIONERS AND PAROLEES ACTUALLY RECEIVING SPECIALIZED SUPERVISION AND COUNSELING SERVICES, IS NOT PUNISHMENT.

A. Introduction.

To analyze Rhode Island's offender fee program, the First Circuit considered *both* "whether the legislative *intent* was punitive in nature" and "whether the challenged civil provision is 'so extreme . . . as to constitute punishment' " 101 F.3d at 783, Pet.App. 7A, *applying Halper*, 490 U.S. at 442. *Halper* affords two levels of protective inquiry: a subjective test to determine whether the *purpose* of a statute is to punish and an objective test to evaluate whether a statute's extreme *effect* is punitive. 490 U.S. at 447-49.

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prosecutions," *Ursery*, 116 S.Ct. at 2139, while the *Ex Post Facto* Clause prevents the passage of laws which retroactively increase "punishment". *Lynce*, 117 S.Ct. at 895.

B. The Appellate Court Properly Applied *Halper's* Subjective Test.

The First Circuit initially noted that, facially, "the offender fee statute, suitably located among other Rhode Island civil statutes, imposes a civil charge." 101 F.3d at 783, Pet.App. 7A.[10] Next, the court below stated that "[t]he modest fee authorized by the statute comprises no part of any sentence imposed for the crime committed by offenders." *Id.* Further, the appellate court reasoned that the fee "is expressly designed to 'reimburse' the Department for costs directly associated with providing goods and services required to supervise probationers and parolees living in the community. R.I. Gen. Laws § 42-56-38." *Id.* In addition, the court of appeals recognized that "all offender fee revenues are dedicated to such use, Regulation 1.12.01(IV)(K), and waivers are available to offenders unable to pay. Regulation 10.07.03(II)(E)." *Id.*[11] Lastly, the First Circuit found that

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[10] The lower court was mindful of *Halper's* admonition that "[f]or purposes of determining whether a law is penal in nature, 'the labels "criminal" and "civil" are not of paramount importance.' " 101 F.3d at 783 *citing Halper*, 490 U.S. at 447.

[11] Approximately 2,547 offenders, almost 20% of the total number, were granted waivers due to financial hardship, Pet.App. 55A-56A, 19, and, as discussed in n. 13, *infra*, "banked" probationers are not required to pay the fee. Regulation 10.07.03(II)(C)(3), Pet.App. 47A.

While Petitioner claims the "fee amounts to a monetary penalty on the Petitioners which ranges between $135.00 and $3405.00", Petition at 6 and the fee also "average[s] $972 each and range as high as $3405.00", Petition at 8, Department of Corrections records reveal that Petitioners Bourget, Silva and Christiansen have zero balances, Petitioner Taylor, who is off

"the same monthly fee is assessed against all offenders released into the community who are currently under Department supervision, without regard to the nature or severity of their respective offenses." *Id.*[12]

Grounded on this analysis, the appellate court pronounced: "In our judgment, so modest a cost-based supervisory fee reasonably cannot be deemed punitive in *purpose*, especially since any conceivable retributive or deterrent effect could only be inconsequential." 101 F.3d

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probation, has an outstanding balance of $60.00 and Petitioner Webb, who would potentially qualify for waiver if he would request one as he is a workers' compensation recipient, has an outstanding balance of $225.00.

[12] The appellate court refuted the district court's determination that the offender fee was "punishment" because it was part of "the law annexed to the crime," *Calder v. Bull*, 3 U.S. 386, 390 (1798), thus linking the offender fee with Petitioners' sentences of probation. *Id.* at n. 6. The court below instead found that "the supervisory services for probationers released into the community are largely rehabilitative, both in nature and purpose." *Id. citing* R.I. Gen. Laws § 42-56-4(c) ("Rehabilitative services shall include . . . intermediary sanctions (including but not limited to . . . probation [and] parole). . . . "); *United States v. Cardona*, 903 F.2d 60, 62 (1st Cir. 1990) (probation serves goals of rehabilitation and public safety), *cert. denied*, 498 U.S. 1049 (1991); *Tillinghast v. Howard*, 109 R.I. 497, 501, 287 A.2d 749, 752 (1972) ("[I]t is for the purpose of giving a convicted accused the opportunity for rehabilitation that he retains his liberty and is placed on probation.") Moreover, the court of appeals highlighted the fact that "the monthly fee is not imposed on all offenders sentenced to probation, but only those actually receiving the supervisory services whose costs are defrayed by the fee. Regulation 10.07.03(II)(C)(3)." *Id.* at n. 6.

at 783-84, Pet.App. 8A. The First Circuit correctly determined that the modest $15.00 monthly fee, assessed only to offenders actively receiving services, bears no punitive purpose whatsoever.[13]

C. The Appellate Court Properly Applied *Halper's* Objective Test.

The court of appeals next "inquire[d] whether the fee nonetheless runs afoul of the objective test announced in *Halper*: a monetary assessment 'that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand

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[13] "[T]he monthly fee is not imposed on all offenders sentenced to probation, but only those actually receiving the supervisory services whose costs are defrayed by the fee. Regulation 10.07.03(II)(C)(3)." 101 F.3d at 784, n. 6, Pet.App. 8A. "Nor are offenders in 'banked' status (*i.e.*, either residing outside Rhode Island or not on supervised status) liable for the fee, *id.* § 10.07.03(II)(C)(3)." 101 F.3d at 781, Pet.App. at 3A.

The First Circuit distinguished *In re Petition of Delaware for a Writ of Mandamus*, 603 A.2d 814 (Del. 1992), in which the monetary sanctions were "blanket surcharges . . . imposed on the offenders at sentencing, rather than reimbursements for the costs of providing services to offenders." 101 F.3d at 784, n. 6, Pet.App. at 8A. "Thus, rather than a blanket fee assessed at sentencing without regard to the commencement or duration of any term of community supervision, the Rhode Island offender fee is directly and rationally related to recouping the State's costs in providing supervision to the individual offenders for whose benefit the services are rendered." *Id.* at n. 8, Pet.App. at 9A.

the term.' " 101 F.3d at 784, Pet.App. 9A, *citing Halper*, 490 U.S. at 448.[14]

"To state the question in this case is to answer it" – is the First Circuit's clear and concise application of *Halper's* objective prong. *Id.* The appellate court quotes the statute's mandatory language that " '[m]onies received under this section will accrue first to the department of corrections for use to offset costs of the specific care or service.' R.I. Gen. Laws § 42-56-38." *Id.* Further, the court below states that "implementing regulations in turn make clear that the offender fee was rationally designed to promote its legislative objective; *viz.*, reimbursement of the Department for its costs in providing the required supervisory services to its probationers and parolees. Regulation 1.12.01(IV)(K)." *Id.* Finally, the circuit notes that "implementing regulations explicitly state that the offender fees collected from probationers and parolees must be deposited in a restricted account, exclusively available for defraying Department costs in affording offenders the required community supervision." *Id.*

Accordingly, Respondents respectfully submit that the First Circuit correctly applied *Halper's* objective test by holding that "the offender fee program is entirely remedial and its practical effect is neither retributive nor deterrent in nature." *Id.* "Under the *Halper* test, therefore, the offender fee is not punitive." *Id.* Thus, the Petition presently before the Court should be denied.

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[14] The court below reasoned that "[u]nder this standard, the offender fee must be deemed 'punitive' if it 'bears no rational relation to the goal of compensating the [state] for its loss.' " *Id. citing Halper*, 490 U.S. at 449.

III. AS THE *EX POST FACTO CLAUSE* IS NOT IMPLICATED BY RHODE ISLAND'S OFFENDER FEE STATUTE, THE FIRST CIRCUIT'S DECISION HAS NO NATIONAL IMPORTANCE.

As set forth above, the $15.00 monthly offender fee, applied only to probationers and parolees actively receiving services from the Department of Corrections, is not punishment. The First Circuit correctly reasoned that the statute has no *ex post facto* implications. Such civil fees, assessed to recover the costs of goods and services, have existed for many decades and have been uniformly upheld.[15] Rather than supporting Petitioners' *ex post facto*

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[15] *See State of Rhode Island v. One Lot of $8,560*, 670 A.2d 772, 776 (R.I. 1996) ("In considering the amount that might be within the remedial limit, the Superior Court may consider . . . the cost in these cases of probationary supervision during the terms of probation imposed."); *Turner v. Nevada Board of State Prison Commissioners*, 624 F.Supp. 318, 321 (D.Nev. 1985) (upheld "the prospective application of deductions to offset the cost of maintaining an offender"); *Mellinger v. Idaho Department of Corrections*, 757 P.2d 1213, 1220 (Idaho App. 1988) ("Parole conditions are not additional punishment or penalties . . . [a]nd [r]equiring the payment of fees to defray costs of supervision is reasonable and has a rehabilitative effect."); *State of Idaho v. Walker*, 887 P.2d 53 (Idaho App. 1994) (held probation supervision fees not refundable despite reversal of conviction; reasoning that defendant had received intangible benefit from probation supervision services); *State of Arizona v. Mears*, 134 Ariz. 95, 654 P.2d 29 (Ariz.App. 1982) (to require a probationer to help defray the State's costs of supervising his probation is beneficial in the rehabilitation of the defendant, and such reimbursement into the probation fund will strengthen the criminal justice system's ability to finance its probation services); *State Treasurer v. Wilson*, 388 N.W. 2d 312 (Mich. 1986) (upheld constitutionality of statute requiring reimbursement for

claim, the fact that the vast majority of states have enacted offender fee statutes, Pet.App. at 65A-67A,[16] buttresses Respondent's central point – that legislatures nationwide recognize modest civil assessments to defray costs directly associated with offenders as both lawful and proper. Moreover, as discussed above, the courts are in agreement. Accordingly, Petitioners' bald assertion that this case has profound national importance lacks credence.

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costs of maintaining inmates in prison); *Auditor General v. Hall*, 1 N.W. 2d 516 (Mich. 1943) (prisoner's statutory obligation to pay for upkeep and maintenance if he has sufficient estate is "civil" rather than "criminal" and is not violative of double jeopardy, equal protection or due process.); *Auditor General v. Olezniczak*, 302 Mich. 336 (1942) (all able prisoners required to pay for maintenance expenses in prison, whether they were sentenced before or after the effective date of the Prison Reimbursement Act). *See also Sheppard* and *Murray*, both *supra*.

[16] This issue was *not* raised in the appellate or district court.

CONCLUSION

It is clear from the facts and law discussed above that the decision of the First Circuit is not in conflict with any decision of this Court or with any other Circuit. No intercession by this Court is necessary. Therefore, this Petition should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JEFFREY B. PINE
Attorney General

THOMAS A. PALOMBO*
Special Assistant Attorney General
Department of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400 Extension 2296

ELLEN EVANS ALEXANDER
Deputy Chief Legal Counsel
Department of Corrections
40 Howard Avenue
Cranston, RI 02920
(401) 464-2622

Attorneys for Respondent
State of Rhode Island

**Counsel of Record*